

The University of Chicago

THE OBSOLESCENCE OF TREATIES

A PART OF A DISSERTATION SUBMITTED TO
THE FACULTY OF THE DIVISION OF THE
SOCIAL SCIENCES IN CANDIDACY FOR
THE DEGREE OF DOCTOR OF PHILOSOPHY

INTERNATIONAL RELATIONS

1937

By

SHYUN KEQ SHAW

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CHAPTER I

RECEPTION OF REBUS SIC STANTIBUS INTO INTERNATIONAL LAW

To any rational thinker the principle that "every contract is understood things standing so" is not wholly unintelligible, in so far as it has been imbedded in the rule of common sense. The Greek rhetoricians, in their method of interpretation, noticed the occasional incompatibility of an occurring case with the apparent intent of the law and realized that it was necessary to judge intent carefully from natural reason. Aristotle conceived of "justice," or "equity," as a correction of the law where it is defective by reason of its universality.¹ The Stoic moralists trod on his toes. Cicero observed that it would be no breach of moral duty, if one failed to carry out a promise which would prove detrimental to either the one to whom the promise has been made or the one who has made it.² Seneca made his remarks in the same vein: "All conditions must be the same as they were when I made the promise, if you mean to hold me in honour to fulfil it."³

¹Magna moralia ii. 2; Ethica Nicomachea v. 10. Cf. Rhetorica i. 15. Thereupon Aristotle taught to argue against any contract which tells against us and for our opponent as follows: (1) one is not bound to observe a bad and mistaken contract; (2) the duty of the umpire is to decide what is just and therefore he must ask where justice lies, and not what this or that document means; (3) it is essential to examine whether the contravenes either universal or any written law of our own or another courts, as well as any other previous or subsequent contracts; (4) it is necessary to see to the question of utility, nothing whether the contract is against the interest of the public or not, and so on.

²De officiis i. 10.

³De beneficiis iv. 35. Stewart's translation. Cf. ibid. iv. 34: "A wise man . . . begins everything with the saving clause 'if nothing shall occur to the contrary.'" Ibid. iv. 38: "It is mere pride and folly to persist that I once have said, be it what it may, shall remain unaltered and settled. There is no disgrace in altering one's plans according to circumstances." Ibid. iv. 39: "I shall go out to supper, even though the weather be cold, because I have promised to go; but shall not if snow be falling; I shall leave my bed to go to a betrothal feast, although I may be suffering from indigestion; but I shall not do so if I am feverish; I will become bail for you, because I promise; but not if you wish me to become forfeiting my money to the state. There

The Scholastic Father, Thomas Aquinas, finding authority in Seneca, proved that one does not sin in breaking his promise if "circumstances have changed with regard to persons and business."⁴ Thus, there is some reason to assert that the starting point of the clausula rebus sic stantibus in international law may be found in Scholasticism.⁵

While the ethical basis of international law may become a proper field for a student of international ethics to explore, suffice it for us to say here that the progress of law does not fall exactly in line with morals. Our task will be thus confined to ascertaining such contentious connotations of the doctrine in its legal form as have been originally embodied in private jurisprudence and later introduced into international law.

Private Law Origin of the Doctrine

The purpose of the following section is not to set forth an exhaustive study of the origin of the doctrine rebus sic stantibus in private law. A complete history of the doctrine which would be worth the task of a legal historian has yet to be written and cannot be adequately dealt with within a limited space. As a prelude to the study of the doctrine in international law, the following brief sketch is to impart some knowledge of its meaning in mediaeval laws antecedent to its development in international law.

Every legal system is confronted with the perpetual antinomy between stability and change which may be exemplified by the constant adjustment of formal rights to the concept of justice and equity. In a primitive society the notion of contract, if not entirely ignored, was quite indefinite and imperfect, and formal law was undifferentiated from the will of God or canons of morality. The religious code of Hammurabi set up an example of currency regulation in case of a vital change of circumstances:

runs through all these cases, I argue, an implied condition; if able; provided it is right for me to do so, if these things be so and so." Italics mine.

⁴Summa Theologica 11. 2, q. 110. See also ibid., q. 140: "Although affirmative precepts are always binding, they are not binding for always, but according to place and time."

⁵Baron de Taube, "Inviolabilité des traités," in 32 R.C. (1930), p. 360.

"If a wine-seller gives 60 KA of drink on credit, at the time of harvest she shall receive 50 KA of grain."⁶ The sacred law of Manu permitted the King "to equitably decide" disputes arising out of the specific rules of enforcing debts.⁷ Besides the recognition of vis major as a plea for non-performance of the contract,⁸ the ancient Greek administration of justice laid stress on the general justice of the case, thereby diminishing the rigor of the rules of contracts.⁹

The separation of law from religion and morality coincided with the distinction of formal rights from vague considerations of justice and equity. A stage of strict law was tinged with legal formalism and rigidity. In Roman law pacta sunt servanda became the controlling principle.¹⁰ Those jurists who detected some traces of the clausula rebus sic stantibus in Roman law failed to find their support in more than isolated fragments.¹¹

When a gift [dare] has been stipulated for himself or for Titius, it is preferable to say that one can with good reason perform it towards Titius, if things remain such as they were in the moment of the stipulation; but if he has been adopted or if he incurred a cause of civil death, one cannot perform efficaciously towards him: the convention contains in effect this tacit clause, if things remain in the state.¹²

Writers generally discredited the view that the foregoing passage could have given birth in the seventeenth and the eighteenth century the principle that the tacit clause rebus sic stantibus is contained in every contract.¹³ Pfaff turned to

⁶The Code of Hammurabi, art. 111. Harper's translation.

⁷Laws of Manu, Bk. VIII, sec. 178, in Müller, The Sacred Books of the East, XXV, 286.

⁸Plato, Laws, Bk. XI, sec. 5. Cf. Digest, Lib. XIX, tit. 11, fr. 25; Sir Paul Vinogradoff, Historical Jurisprudence, I (1925), 258.

⁹Vinogradoff, op. cit., I, 68; J. H. Wigmore, A Panorama of the World's Legal Systems, I, 324.

¹⁰Digest, Lib. II, tit. xiv, fr. 8.

¹¹B. F. Koch, Das Recht des Forderungen nach gemeinem und nach preussischem Recht, Vol. II, sec. 137, p. 460.

¹²Digest, Lib. XLVI, tit. 111, fr. 38. Translation and italics mine.

¹³Förster, Theorie und Praxis des heutigen gemeinen preussischen Privatrecht, I, 526. Cited with approval in Pfaff, Die Clausel Rebus sic stantibus in der Doctrin und der österreichischen Gesetzgebung, 1898, pp. 3-4; Fritze, "Clausel rebus sic stantibus," Archiv. Burg. Recht, XVII (1900), 23.

another fragment from Neratius which gave a condictio ab causam:

If a divorce takes place before both persons have reached the proper age, the money can be recovered, but so long as the two parties continue to cohabit as husband and wife, the money can as little be demanded back as can property given by an unmarried woman to her intended husband by way of dos, so long as the time of betrothal remains between them: the fact being that whenever anything is given with that object before the marriage takes place, then, seeing that it is given under such circumstances that it may become a fully established dos, it cannot be asked back so long as the possibility remains of its being so fully established.¹⁴

Pfaff found that the clause rebus sic se habentibus was first invoked by the glossators on this passage.¹⁵ Whatever else may be cited to the same effect from the Corpus juris civilis,¹⁶ and however ingenuous the glossators may be in discovering a novel terminology, the doctrine rebus sic stantibus in its general form cannot be inferred from these instances in Roman law. In the absence of express resolutive conditions the contract should be strictly enforced unless vis major or casus fortuitus occurred.

Like Roman law the early Germanic law was a specimen of a rigid formalism. It did not recognize the doctrine rebus sic stantibus, although instances were not lacking in which a party

¹⁴Digest, Lib. XIII, tit. iv, fr. 8. Monro's translation.

¹⁵Pfaff cited the gloss as follows: "Suppose this 'possibility' be extensively understood (as the Dialecticians used to say), so long as both parties are living and even are given a divorce there should be no recovery, for it always remains possible that this marriage may take place. But certainly we do not use it extensively, but judge it according to the present state and express ourselves in the way that things so stand (rebus sic se habentibus) or until one of the parties has contracted another marriage" (op. cit., p. 7).

¹⁶For other examples in the Digest, see also Digest, Lib. XIX, tit. ii, fr. 54; Lib. XXVIII, tit. vi, fr. 43; Lib. XXXIV, tit. viii, fr. 3; Lib. XXXIX, tit. ii, fr. 28; Lib. XLV, tit. i, fr. 56; Lib. XLV, tit. i, fr. 98.

Similarly the Code offered the following examples: the proprietor may without immunity withdraw from the contract of letting if he requires for his own use the res locata, that he will repair it, or that the tenant has abused it (Code, Lib. IV, tit. lxxv, sec. 3); or a donation may be revoked after an unexpected birth of a child of the donor (Code, Lib. VIII, tit. lvi, sec. 8), or on the ground of ingratitude (Code, Lib. VIII, tit. lv, sec. 10).

The Institutes cited without reprobation a passage from Gaius (Gai Institutiones iuris civilis iv. 78) which considered the right of action as extinguished in case "a state of circumstances has arisen in which an action is impossible" (Institutes, Bk. IV, chap. viii, sec. 6).

might be released from the contract after specific changes of circumstances.¹⁷

Even in Canon Law which was less concerned with legal formalism than with abstract notion of justice and equity no fragment may be taken as expressive of the general doctrine rebus sic stantibus. Indeed the Gratian Decretal quoted from the Scripture that it was not lying for the Apostle to defer his visit to the Corinthians, although he had promised to come first unto them, because a change of circumstances had supervened.¹⁸ The Devretal further considered that one does not lie in such case as: for example, one who borrows a sword and promises the lender to return it on demand should not, obvious enough, return it, if perchance the latter becomes made in demanding his sword, or if he would kill himself or others, until his sense will be recovered. The borrower, therefore, is not double-hearted because in making the promise he did not contemplate that the lender could have been in a mad state.¹⁹ The Gregorian Decretal formulated the following principle of marriage: I A has sworn to B in a contract of marriage that A shall keep B forever as lawful wife, A cannot divorce B for fornication B had committed before, but only for fornication B may commit hereafter, in spite of the sworn promise, for the tacit condition is always understood that the wife shall not violate the law of marriage. Besides, if after such a sworn promise, B should be affected with not only leprosy but paralysis, or have hereyes lost or her nose cut, or anything infamous occurred to her, A is not obliged to perform the contract.²⁰

¹⁷Edict of Rothari, 180: "If it occurs that a girl or woman after having contracted marriage becomes affected with leprosy or blindness in both eyes, then the man may recover his things and will not be obliged to take her to betrothal involuntarily, and, for these causes, he would not be culpable, for it is not a matter of his non-performance, but imminent sin disease have supervened" (Walter, Corpus juris germanicus, I, 711). Law of Visgoths, Tit. IV, 4: "Whoever receives the earnest for whatever thing it may be is obliged to fulfil the agreement. If the buyer will not pay up the price within the definite time, only the earnest given may be recovered and the contract as to specific performance is void" (ibid., p. 518). Cf. Fritze, op. cit., pp. 26ff.

¹⁸Corpus juris canonici, Decretum Gratiani, Lib. II, quest. 2, c. 2, causa 25.

¹⁹Ibid., c. 14, causa 22.

²⁰Decretal Gregorii, Lib. II, tit. xxiv, c. 25.

Fritze found that the glosses on these Decretals referred to the clause rebus sic stantibus.²¹ Under the narrow premises of these passages from the Corpus juris canonici, the glossators, however, can not be famed with having formulated a systematic doctrine in their cursory glosses. In fact, it seems that the scattered passages in the Corpus juris canonici were not necessarily the origin for the canonist doctrine, but only the pegs to hang it on when it was later developed for particular economic and ideological reasons.

The juristic recognition of the doctrine may have been influenced by the current events. It is generally agreed that the doctrine was introduced by the Post-glossators. By Bartolus the clausula rebus sic stantibus was originally so limited as to apply to only the renunciation of rights. His followers, including Baldus, Jason de Mayno, Tiraquellus, etc., extended its application to every act of declaration of will, or every legal transaction.²² The Age of Post-Glossators coincided with an era after the disruption of the Roman Empire. Wars and disturbances gave rise to economic disasters for which the actual law was inadequate to furnish any remedy. Conscious of the need for a general law to supersede, and to eke out, different local customs after centuries of international crises and disorders, the Post-Glossators made attempt to build an abstract jurisprudence.²³ Their influence was distinct in judicial decisions and such early eighteenth century code as the Codex Maximilianeus Bavaricus civilis of 1756.²⁴

²¹The glosses on both the Gratian and the Gregorian Decretals stated that in a promise the condition is to be understood, 'if things remain in the same state.' Cited in Fritze, op. cit., pp. 30-31.

²²Cf. Pfaff, op. cit., pp. 8-10; Fritze, op. cit., pp. 34-40.

²³Sohm, Institutes of Roman Law, pp. 140 ff. Ledlie's translation.

²⁴Cod. Maxim., Pt. IV, c. xv, sec. 12: "All obligations tacitly contain in themselves the clause rebus sic stantibus in such way that obligations are extinguished by the change of such state of affairs as is understood, but only under three conditions: first, that the change be not imputable to the delay, fault, or act of the debtor; secondly, that it should be of such a nature that if the debtor had foreseen similar alterations in advance, he would not, according to the impartial and reasonable sense of the sound mind, have ever been engaged. If these conditions are established, it remains to be decided whether the obligation

The juristic rejection of the doctrine since the later eighteenth century incidentally coincided with the growth of modern legislation which resulted in the adoption of the civil codes in many European states. These codes which dealt a deathly blow upon the defunct doctrine of the Post-Glossators, were presumably influenced by two factors: (1) the economic disturbances and disasters of the Middle Ages were minimized by the formation of modern national states; (2) these modern states began to improve the process of legislation.

If the modern civil codes are almost as formalistic and as rigid as Roman law and do not contain the doctrine rebus sic stantibus, except under very limited form, the doctrine has been enlarged and resurrected after the War when the economic disasters were tremendous and the incompetence of the legislature to remedy the situation became manifest.²⁵

The Founders of International Law

For the moment, we may turn to the attempt of international lawyers at the perpetuation of a doctrine which has been suggested as dying, but recently revived after the World War, in civil law.²⁶

To begin with, the Spanish precursors of international law did not mention expressly the clausula rebus sic stantibus, although some analogous doctrine is scattered here and there in their writings. Victoria contested the validity of a law after certain changes of circumstances. He embarked on the idea that law may cease to exist "when the reason which caused the law to be established ceases to exist."²⁷ The reason of a law, he defined, is its being useful to the state, or, a modern writer will say, utility in the Benthamite sense of the word.²⁸ Suarez amplified

should be entirely extinguished or adapted in proportion to the supervening change." Cf. The General Code of the Prussian States of 1794, Pt. I, tit. B, 3: "The contracts are dissolved . . . no. 3. By change of circumstances."

²⁵Cf. Cattand, La clause "rebus sic stantibus" du droit privé au droit international, 1929, Pt. I. Infra, chap. iii.

²⁶Strupp, in Wörterbuch des Völkerrecht, p. 336.

²⁷De potestate civili xlii. 220, in J. B. Scott, The Spanish Origin of International Law, App. C, xc.

²⁸Cf. J. B. Scott, op. cit., pp. 268-69.

the same test of utility in considering when and for what cause one may abrogate the law.²⁹ Ayala discussed incidentally the effect of changed circumstances on a sworn promise. In denying that agreement made under an oath need be kept with one who has broken his pledge, he argued: "For circumstances that may hereafter arise are outside the scope of an oath, and if, some novel factor emerge, any one refuse to carry out what has sworn." Thereupon he subscribed with hearty approval Cicero's doctrine "that there are occasions when duty completely change shape, and the course is not to keep faith, e.g. when it is a question of returning to a madman or to an enemy of one's country a sword that he has deposited with us."³⁰

While the Spanish moralist-jurists did not contribute much to the doctrine rebus sic stantibus, it remained for the Founders of International Law to find their legacy in the Post-Glossators. It seems convenient to classify early writers in international law into three groups: Whether the municipal law doctrine was to be transplanted into international law only under qualifications? Whether it was to be applied by analogy without any reservation? Whether it was to be discarded lock, stock and barrel in international law?

The qualified clause rebus sic stantibus.--The eclectic position which realized both the necessity and the danger of the doctrine admitted it only subject to a positive proof that the implied intention of the parties contemplated the continuance of certain essential circumstances to be a condition of the validity of a treaty. Most classical writers, including both the Grotians as well as the Naturalists, fell in with this compromise.

Born of a distinguished Dutch family, active in local politics, and sent on missions to France and England, Hugo Grotius was weary of international wars of the day to which his native land was an easy victim. Thus, he decried violence. Following the path of Roman law, Grotius assimilated public treaties with

²⁹Dec ac deo Legislatore, Lib. VI, c. xxv: "It is, however, not necessary that the change of circumstances be such that it will make the law unjust or entirely inutile, but it is sufficient that it appears to be either too rigorous or less useful, or that a greater benefit may be expected from its revocation, or greater danger or evil may be thus avoided."

³⁰Jure et officiis bellici et discipline militari, Pt. I, sec. 6. J. P. Bate's translation.

contracts and refuted the clause rebus sic stantibus, unless it was perfectly clear that the present state of affairs was included among the reasons which originally caused the promise.³¹ While he prima fachi denied the doctrine, he really gave it a blessing within a limited range. The justification of the doctrine, according to him, was to be found only in the intention of the parties.³²

Samuel Pufendorf lived in a period after the Reformation Wars. Germany was divided into separate principalities and the spirit of nationalism declined. Rationalistic rather than nationalistic, the Founder of the Naturalist School followed close on the heels of Grotius's work. Qualifying the clause rebus sic stantibus as "odious," he sanctioned its application only when it was expressly provided, or when the only reason which motivated the promise no longer existed.³³ He based the doctrine on the natural rights of a state living in a state of nature.³⁴ Nothing can be more explicit than the following statement from Pufendorf: ". . . since every Prince is, in the first place, obligated to protect his own People, all the Promises, which he makes to

³¹De jure belli ac pacis, Bk. II, c. xvi, sec. 25; also ibid., sec. 22. Kelley's translation.

³²Grotius offered as an example that no aids need be furnished to an ally so long as the forces are needed to meet dangers at home (ibid., sec. 27).

³³De jure naturae et gentium, Lib. V, c. xii, sec. 20. Kennett's translation. The Naturalist commentator Barbeyrac also concurred with this view in saying: "Not because the Condition is odious, but because, if we suppose it implied in every Engagement, there is still something which may be relied upon ordinary with some certainty" (ibid., n. 2).

³⁴The basic assumption of the natural rights and duties of the state was given by Pufendorf in the following terms: ". . . as Persons that live in a Liberty of Nature, and own no subjection, are under their own Conduct, and are Judges in their own Affairs; so if they are unjustly injured in their Contracts, they may by their own Authority demand Restitution or Amendments to be made to their Agreement; on supposition that the Prejudice and Injury they sustain be visible and manifest. For when the Thing is disputed the matter must be referred to the Decision of Arbitrators. And therefore if a Prince, since he is still in Possession of his Natural Liberty find any Abuse put upon him in the Terms he has consented to, he may by his own Authority declare to the Party concern'd, that he will not be obliged to stand to any such compact. And there is no Necessity that he should procure a Release, since the Thing is in its own Nature, incapable of producing Obligation or Right" (ibid., Lib. VIII, c. x., sec. 2).

Foreigners are understood to extend no further than the Safety of his own Kingdom admits."³⁵

Again, Pufendorf went further to admit: "In all Leagues which a Prince enters into with his Neighbors, upon the Point of Assistance and Supplies, this Exception ought always to be supplied, if the Condition and Circumstances of my Kingdom will permit."³⁶

Cocceji commented briefly on Grotius's text, adding nothing new than that the legal act ceased to be binding after a change of "essential" circumstances.³⁷ In one of the earliest monographs on the doctrine rebus sic stantibus, he classified in detail the changes of circumstances into essential and accidental status, with a view to distinguishing their effects on a treaty.³⁸ Wolff, who once fell into political disgrace because of his teachings for international cooperation, did not recognize the doctrine by name, but took for granted that necessity or the right of self-preservation,³⁹ formed a tacit exception to every treaty.⁴⁰ His Swiss disciple Vattel, who had served both as diplomat and as councillor of Saxony, further developed the qualified doctrine rebus sic stantibus:

If it is certain and evident that the consideration of the circumstances existing at the time entered into the motive of the promise, that the promise was made in view and because of those circumstances, the promise is dependent upon the continued existence of the same circumstances. That is evident, since the promise was only made upon that supposition. When, therefore, the circumstances are essential to the

³⁵Ibid., Lib. VIII, c. xii, sec. 2.

³⁶Ibid., Lib. VII, c. ix, sec. 5.

³⁷Grotius illustatus seu commentari ad Hugonis Grotii de iure belli ac pacis, Lib. II, c. xvi, sec. 25, p. 2. Cited in M. Knoefel, Die Clausula Rebus sic stantibus im Völkerrecht (Breslau, 1908), p. 15.

³⁸Exercitationum curiosarum, Legovia (1722), II, Disput. xv. Cf. M. Knoefel, op. cit., pp. 15-18.

³⁹Jus gentium methodo scientifica pertractatum, sec. 666. Drake's translation. "Every one sees that there is in a treaty this tacit exception, unless want should stand in the way; a thing which is quite in harmony with a just interpretation." Also ibid., secs. 665, 1032.

⁴⁰Ibid., sec. 388: "... there is in this agreement the tacit provision that the case should be excepted in which you necessarily need for the preservation of your own nation that which is to be performed for the other nation." Also ibid., sec. 158.

promise, and without which promise falls when its basis is destroyed; and in particular cases, when circumstances cease for a time to be the same as those which brought about or helped to bring about the promise an exception should be made to its enforcement.⁴¹

Vattel, therefore, decried against the violation of a treaty merely for "some injury or some advantage," although he justified the termination of a treaty which would "bring about the ruin of the nation." A treaty "disastrous" to the state, he admitted, could in no way be binding upon it, for the duties of the nation conflicted with the treaty and necessity formed an exception to its observance.⁴²

In brief, the qualified view had been generally assumed by those writers who were eager for international co-operation and weary of violence. Rationalistic in thinking and cosmopolitan in outlook, these writers were little influenced by nationalism and Machiavellism.

The unqualified clause rebus sic stantibus.--The extreme view that the tacit clause rebus sic stantibus is part of every treaty and presumably terminates a treaty after changed circumstances, was upheld by only such early historical writers as Gentilis and Zouche. An Italian refugee and Regius Professor of Civil Law at Oxford, Gentilis engaged in applying the growing theory of international law to current issues. His familiar background was a state of disunity in Italy where the actual practice and the utterances of the statesmen generally followed the Machiavellian tradition that no treaty survived changed conditions.⁴³ Thus, writing even earlier than Grotius, Gentilis definitely supplied the clause rebus sic stantibus with every treaty. An exception is allowed, he says, to the binding force of treaties, "when the condition of affairs is changed, if the change could not have been foreseen."⁴⁴

Zouche, Professor of Oxford and sometime judge of admiralty, transmitted without remonstrance an isolated English

⁴¹Le droit des gens, Bk. II, chap. xvii, sec. 296. Fenwick's translation.

⁴²Ibid., Bk. V, chap. xii, secs. 158, 160, 170.

⁴³Gentilis cited with approval the words of "a great Venetian Senator: "New developments excuse one who has made a treaty" (De jure belli, Bk. II, chap. xiv, p. 365. Rolfe's translation).

⁴⁴Ibid., pp. 365 f. Also ibid., chap. xxiv, p. 430.

precedent which appeared to be audacious. In the treaty of alliance of 1585 between Great Britain and the Netherlands, it was agreed that Great Britain should furnish the Netherlands certain quotas of troops equipped and financed by her Government, on condition that the expenses be refunded at the end of the common war, against Spain. Prior to the conclusion of the war, Queen Elizabeth demanded back her expenses, in 1595, because England was largely drained of her resources. Zouche cited with apparent approval the advice of the juriconsults to the Queen as follows: "Every convention, although sworn, must be understood to hold only while things remain in the same state; that a man is more strongly bound to his country than to a private promise; and that princes are not bound by their contract when the contract results in public injury."⁴⁵

The assertion that a treaty may be invalidated on the mere ground of "public injury" associated the doctrine rebus sic stantibus with the notorious principle of "reason of state." Grotius⁴⁶ and Bynkershoek,⁴⁷ both Dutch jurists, strongly condemned this obnoxious incident. It seems that Zouche might be influenced by his inclination towards the British monarchy.

In brief, the extreme view of the doctrine was accepted by only a few who might be inferred to have been influenced by Machiavellism or nationalism, for one reason or another.

The negative view.--Aware of the hazardous consequence of an unqualified clause rebus sic stantibus, the later positivists deviated from the extreme course of their predecessors and sought to avoid the doctrine altogether. Purging themselves of the natural law fiction, such writers reverted to the same degree of rigidity as in Roman law and allowed no legitimate release from treaty obligations after changed circumstances except in case of impossibility, physical as well as moral.

Without explicit reference to the clause rebus sic stantibus, Textor, sometime professor of Roman law and later of jurisprudence in some German universities, allowed an exception

⁴⁵Juris et judicii feccialis, Bk. II, sec. 30, p. 104. Brierly's translation.

⁴⁶Op. cit., Bk. II, chap. xvi, sec. 17.

⁴⁷Quaestionum juris publici, Bk. II, chap. x, pp. 194-95. Frank's translation.

from the observance of treaty obligations if moral impossibility supervened. Thereupon he concurred fully with Grotius's views and eulogized them as "certainly sound" in regard to "a case of necessity."⁴⁸

It remained, however, for Bynkershoek to attack the doctrine rebus sic stantibus. It seems reasonable to infer that Bynkershoek stood for the traditional policy of the Dutch Government. The Estates, by an edict dated May 28, 1669, condemned a book which taught that "state agreements should be observed only when it was advantageous to do so," and declared that "this state which took the greatest pride in the strict observance of treaties had always and still abhorred this view."⁴⁹

Thus, the doctrine rebus sic stantibus savored of Machiavellism to Bynkershoek. This doctrine, he believed, would justify the extinction of an agreement in such cases as:

- (1) If a new condition has arisen suitable for reopening discussion;
- (2) if circumstances have come to such a pass that one can not take action;
- (3) if the reasons that promote the alliance have ceased to exist;
- (4) if the needs of the state or expediency demand a different course.

The last exception appears to him to be particularly detestable. It seems that Bynkershoek attempted to rejuvenate and to limit the other components of the doctrine under a different name. While he did not recognize the existence of the tacit clause as a rule of treaty interpretation, he admitted some exceptions from the rule pacta sunt servanda. First, a prince need not send his promised aids to an ally who is attacked for a just cause; secondly, a prince who is "unable through circumstances" to fulfil his promise can not be compelled to perform his obligations. As to the question whether a prince can or cannot keep his agreement, or whether it is due to another prince that he can not, Bynkershoek left its solution to the arbitrament of the neutrals only.⁵⁰

⁴⁸Synopsis juris gentium, chap. xxiv, sec. 28. Bate's translation.

⁴⁹Bynkershoek, op. cit., Bk. II, chap. x, pp. 194-95. Frank's translation.

⁵⁰Ibid., pp. 190-93.

In fact, the writers who attacked the doctrine rebus sic stantibus generally showed a reaction against Machiavellism, which was inappropriately linked up with the doctrine. The negative writers did not differ substantially from the qualified view in that they permitted impossibility of performance as an exception of the obligatory force of treaties.

Conclusions

While one of the main objects of law is to give effect to formal rights according to the reasonable expectation of the benefited party even at some sacrifice of the vague equitable claim of the dissatisfied party, every system of law, in certain cases, has recognized some exceptions from the rule pacta sunt servanda. These exceptions may be given as follows: (1) the impossibility of performance; (2) emergency or necessity; (3) the clausula rebus sic stantibus. The ups and downs of the last doctrine hinge on the magnitude of economic disasters as well as on the adequacy of the legislative machinery to provide for remedy.

The attitude of the Founders of International Law towards the doctrine was determined to a great extent by their method of approach as well as by their personal aptitude and the influence of the current events. Most pacific writers with cosmopolitan outlook favored the retention of the doctrine within its narrow legal scope. They realized at once the necessity and the danger of the doctrine. Those who were influenced by nationalism and Machiavellism were apt to confound the doctrine with the dangerous political principle of "reason of state." Those who disliked the doctrine because of their anti-Machiavellism generally attacked the danger of linking up the doctrine with the "reason of state," but equally admitted that a state should be released from its treaty obligations at least in case of necessity or impossibility of performance.

CHAPTER II

MODERN ANALYSIS OF THE DOCTRINE

Continuing the lead of the classical jurists in the discussion of the clausula, the modern publicists do not appear to have been either unanimous or precise in the definition of the familiar rubric. A recent proposal to restate the doctrine in unequivocal terms has been made by the Draft Convention on the Law of Treaties by the Harvard Research in International Law:

(a) A treaty entered into with reference to the existence of a state of facts the continued existence of which was envisaged by the parties as a determining factor moving them to undertake the obligations stipulated, may be declared by a competent international tribunal or authority to have ceased when that state of facts has been essentially changed.

(b) Pending agreement by the parties upon and decision by a competent international tribunal or authority, the party which seeks such a declaration may provisionally suspend performance of its obligations under the treaty.

(c) A provisional suspension of performance by the party seeking such a declaration will not be justified definitively until a decision to this effect has been rendered by a competent international tribunal or authority.¹

It may be seen, therefore, that in order to evolve an adequate and clear conception of the doctrine, it is necessary to examine a little more closely two distinct problems: (1) In what the doctrine rebus sic stantibus consists, if it exists at all? (2) What are the rules for its application? One is the formal question of its scope and nature, the other is the question as to its practical effects.

The Scope and Nature of the Doctrine

Modern publicist, like classical writers, do not agree fundamentally whether the doctrine rebus sic stantibus is an accepted rule of international law. The adversaries of the doctrine, if only small in number, at times reject it in toto,² at

¹Art. 28, in A.J., Vol. XXIX (1935), suppl.

²Wildmann, in rejecting the doctrine, admitted that the treaty obligations remain unaffected by the change of circumstances

times characterize it as merely a political or moral maxim,³ at times call it a principle de lege ferenda,⁴ and at times object to it merely because of certain undesirable interpretation of the doctrine.⁵ Even among those who accept the existence of the doctrine in international law, disagreement arises as to its scope and limitation. The conservatives recognize the doctrine as both desirable and dangerous, with a view to limiting it as far as possible, while the radicals seek to minimize the binding force of the treaties by an extension of the doctrine. This difference seems at the very outset to be the result of a juxtaposition of the clause rebus sic stantibus with two conceptions diametrically opposite to each other. On the one hand, the doctrine may be associated with the pseudo-legal principle that presupposes the absence of law over and above the states and leaves the binding force of a treaty to the discretionary will of one of the contracting parties; on the other, the doctrine may be confined within a legal orbit in that it terminates a treaty after vital change of circumstances by giving effect to either the original intention of the parties or some salutary principle of law.

which has not rendered their performance impossible (Institutes of International Law [1849], p. 175). Triepel jettisoned the doctrine even if the treaty can be "no longer executed" (Droit international et droit interne, p. 426. Genet's translation).

³B. Schmidt considered the doctrine as merely expressive of the ultimate law-making influence of facts (Die völkerrechtliche clausula rebus sic stantibus [1907], p. 59). Likewise W. Schneider concluded that the doctrine is a political maxim (Die völkerrechtliche clausula rebus sic stantibus und Art. 19 der Völkerbundsatzung [1931], p. 89). Cf. Bullington, "International Treaties and the Clause 'Rebus sic stantibus,'" 76 Univ. of Pa. L. R. (1927), pp. 153-77; K. R. Sastry, "Clausula rebus sic stantibus in International Law," Canadian Bar Review (1935), pp. 227-29.

⁴J. L. Brierly, "Some Considerations on the Obsolescence of Treaties," 11 Trans. Grot. Soc. (1926), pp. 13 ff.; H. Lauterpacht, Private Law Sources and Analogies of International Law (London, 1927), pp. 167-69; The Function of Law in the International Community (London, 1933), pp. 272-73.

⁵F. von Liszt denied the existence of the clause rebus sic stantibus, which, he considered, was incompatible with the obligatory character of a contract, but he admitted the right of necessity, or of self-preservation as a proper ground for the modification of treaty (Das Völkerrecht, ed. Fleischmann, pp. 264-65). Likewise K. Strupp thought that "there is no more clause rebus sic stantibus; when one claims it, it is a question either of the right of necessity, or a violation of international law" (Traité du droit international, I [Paris, 1927], 342). Also ibid., p. 282.

The doctrine as a pseudo-legal principle.--The radical writers who give a pseudo-legal interpretation of the clausula rebus sic stantibus deny altogether the existence of international law and find instead that the validity of a treaty is determined solely by the interests of a state. This cynical attitude may be traced back to Machiavelli.⁶ Whether it be Thomas Hobbes who poignantly remarked that in a state of nature a state is bound by law only so long as the force of circumstances compels it,⁷ or Spinoza who believed that no one contracts for the future except on the hypothesis of certain circumstances the change of which likewise alters the reason underlying the whole position,⁸ or Hegel who asserted that the relation between states is a relation of autonomous beings, which stipulate between themselves but stand at the same time above these stipulations,⁹ all these views which were calculated by the political theorists to support a general theory of state led to the conclusion that a state should be bound by the treaty only so long as its interest demands. Lasson was the influential international lawyer who idolized the notion that treaties between the States are expressive of their respective powers¹⁰ and that the clause rebus sic stantibus not only is

⁶The Florentine philosopher stated: "A wise lord cannot, nor ought he to, keep faith, when such observance may be turned against him and when the reason that cause him pledge it exist no longer" (*The Prince*, chap. xviii, p. 142. Marriott's translation). In distinguishing the grande morale from the petite morale, he justified that every consideration being set aside, that course must be taken which preserved the existence and liberty of the state (*Discourses on the First Decade of Titus Livius*, p. 473. Thompson's translation).

⁷*The Elements of Law*, ed. Tönnies, pp. 100-101; also *The Leviathan*, ed. Molesworth, III, 342-43.

⁸*Political Treatise*, III, 14. R. H. M. Elwes's translation (1883). Sir Frederick Pollock cited Spinoza's view with approval (*Spinoza, His Life and Character* [1899], p. 307). For criticisms, see Creasy, *First Platform of International Law*, p. 41, note; Lauterpacht, "Spinoza and International Law," 8 *B.Y.* (1929), pp. 89 ff.

⁹*Grundlinien der Philosophie des Rechts*, sec. 330. Cf. *ibid.*, sec. 333.

¹⁰*Prinzip und Zukunft des Völkerrecht* (Berlin, 1871), p. 55. See *ibid.*, p. 61: "A treaty is valid only so long as it is not contrary to the interest of any of the contracting States, and since this can never happen a treaty which imposes obligations on one State, any such treaty is valid only so long as it has behind it a sufficient force to compel its execution, in case of necessity, with certainty of success."

understood in every treaty but must be interpreted by the state which has interest in it.¹¹ This point of view resembled the nationalistic appeal of his compatriot Treitschke who, in glorifying war, attributed every state with the indisputable right to denounce the "antiquated" treaty and replace it with one "more consonant with circumstances."¹² More political than juridical, the utilitarian concept confuses the doctrine rebus sic stantibus with Machieavellism and legal anarchism. In so far as it is presumed that no superior law exists between the states, it is, after all, unnecessary to make even any justification for the doctrine, for the obligatory character of a treaty is utterly obliterated.¹³

Those who do not repudiate the existence of international law have sometimes contested its legal nature. For the analytical jurists¹⁴ as well as the ausseres Staatsrecht school,¹⁵ international law is not positive law and treaties are not binding in a legal sense. The promises between the states, it has been conceived, depend on "no other coercive force than that of morality and public expediency." The clause rebus sic stantibus, so to speak, may be asserted by the state to declare a treaty ineffective "when by change of conditions their welfare has become greatly affected or menaced as to overbalance the evil results to be expected, by way of retaliation or otherwise, from the violation of their faith as given in a treaty."¹⁶

¹¹Ibid., p. 65.

¹²Politics, I, 29, 96; II, 597. Dougdale's and De Bille's translation.

¹³Professor C.C. Hyde well remarked: "The reliance, therefore, on a change of conditions which refers merely to the development of the power of such a state to a point where it may safely ignore the terms of its agreements, is an appeal to force rather than to law" (International Law [Boston, 1922], Vol. II, sec. 541, p. 81).

¹⁴E.g. Austin, Lectures on Jurisprudence (1835), II, 754; Stephen, A History of the Criminal Law of England, II (1883), 35.

¹⁵P. Zorn, "Die deutschen Staatsverträge," in Zeitschrift für die gesamte Staatswissenschaft, XXXVI (1880), 1 ff.; A. Zorn, Grundzüge des Völkerrechts (1903), pp. 7 ff.; L. Schecher, Deutsches Ausserenstaatsrecht (1933), pp. 21 ff.

¹⁶W. W. Willoughby, The Nature of the State, p. 198. Cf. his modified view in The Fundamental Concepts of Public Law where he admits international law as a body of international principles or jurisprudence (pp. 278-305).

Still others who exaggerated the specific character of international law connected the doctrine rebus sic stantibus with the nature of international law, namely the auto-limitation of sovereignty. Georg Jellinek, as well as his followers particularly in Germany, gave the classical expression: "International law exists for the states, and not the states for international law."¹⁷ The clause rebus sic stantibus, he conceived, is implied in every treaty. A state is legally bound by the treaty only so long as its will remains unchanged. Whenever the primary interests of the state conflict with treaty obligations the latter must give way.¹⁸ After Jellinek, the conception of international law as law of co-ordinated entities has become popular in Germany and abroad.¹⁹ Erich Kaufmann was typical of the pre-war German writers who justified the doctrine rebus sic stantibus on the assumption of international law as a law of co-ordination, and not of subordination.²⁰ According to him, the validity of the treaty depends on the power and the interests of the state.²¹ This pattern of thought has been conspicuously followed by international lawyers of the present National Socialist Germany. Some monists who base their "realistic" theory of international law on the primacy of municipal law recognize the clause rebus sic stantibus as an important limitation upon international law, for it is conceived that national interests must be given primacy over international interests in the present international law.²² Some dualists who define international law as a law of co-ordination based on the recognition of state equality refute the validity of "peace

¹⁷Allgemeine Staatslehre (1929), p. 377.

¹⁸Ibid., pp. 741-42. Cf. G. Jellinek, Die rechtliche Nature der Staatenverträge (1880), pp. 2ff., 62 ff.

¹⁹E.g. O. Nippold, Der völkerrechtliche Vertrag (1894), pp. 244 ff.

²⁰Das Wesen des Völkerrechts und die clausula rebus sic stantibus (Tübingen, 1911), p. 153.

²¹Ibid., p. 181; also pp. 196, 204.

²²O. Koellreutter, Grundriss der allgemeinen Staatlehre (1933), pp. 229, 230. H. Kraus likewise considers that the fulfillment of international obligations should be subject to the condition that no vital interests of the state are violated ("Interesse und zwischenstaatliche Ordnung," in Niemeyers Zeitschrift für internationales Rechts, XLIX [1934], 63).

treaties" which conflict with the right of equality.²³ These adaptations of the theory of auto-limitation seek to rationalize the National-Socialist Weltanschauung.

The justification of the doctrine rebus sic stantibus on the specific character of international law represents only an unsuccessful attempt to reconcile absolutist sovereignty with the existence of international law. The emphasis on the specific character of international law, with or without the help of the theory of auto-limitation, constitutes no more than a verbal recognition of its legally binding force. The obligatory character of international agreements rests on an objective rule of law over and above the wills of the state.²⁴ If the doctrine rebus sic stantibus is based on the wills of the state which are ever changing and unstable, the ultimate conclusion is to justify in advance all the arbitrary and capricious action a state is prepared to take up, and is indistinguishable from the very negation of the legal character of international law.

Some writers find the basis of the doctrine in the theory of the fundamental rights of a state which was originally popular in French jurisprudence. Hauterfeuille regarded a treaty containing the gratuitous cession, or abandonment of an essential national right such as part of its independence, as not obligatory.²⁵ The doctrine was either extensively or restrictively interpreted by later jurists. The radicals recognize even the ill-defined right of development and welfare of a state,²⁶ whereas the conservatives limit it to the right of existence or of

²³Cf. V. Bruns, "Deutschlands Gleichberechtigung als Rechtsproblem," Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Heft 21 (1934), especially pp. 26-27.

²⁴Verdross, "Le fondement du droit international," in 16 R.C. (1927), pp. 266 ff.

²⁵Des droits et des devoirs des nations neutres en temps de guerre maritime, I (1868), xiii.

²⁶Meffter, Le droit international de l'Europe, ed. Bergson (Paris, 1883), sec. 98; Bluntschli, Le droit international codifié (Paris, 1870), sec. 361, p. 263, n. I (French translation by Lardy); Pradier-Fodéré, Traité de droit international public européen et américain (Paris, 1895), II, 284; Règles Internationales et diplomatie de la mer, I (1864), 91; Fiore, Nouveau droit international public (Paris, 1885), I, 320, 325 (French translation by Antoine); Oppenheim, International Law, ed. MacNair (London, 1926-1928), sec. 839; Garner in 21 A.J. (1927), pp. 515-16.

self-preservation.²⁷

Besides the controversy as to what constitutes the fundamental right of a state, these jurists have not always made clear whether an injury to the fundamental right of a state would render the treaty void ab initio, or only after a change of circumstances. If the doctrine of the fundamental right of a state is taken as a test of the clause rebus sic stantibus, it would ignore in effect whether or not a change of circumstances has occurred. Besides, the clause rebus sic stantibus may be conceivably applicable to certain changes which would not affect the fundamental rights of a state at all. It may be still arguable that there would be no juridical remedy in case of a conflict between the fundamental rights of the obliged and the benefited party.²⁸

Sometimes the doctrine rebus sic stantibus is juridically justified by an exaggeration of the incompatibility of fact with law. It is necessary for the jurists to realize the inseparable connection between law and fact, because international law, like any other law, must recognize facts. However, one can not admit the primacy of fact over law as in the case of the Soviet jurisprudence. In the earlier stage of revolution the Soviet state "has been founded on the primacy of conformity with the object over legality, the primacy of fact over law."²⁹ Although the extreme orthodox Marxist doctrine later gave way to the recognition of a transitional international law as revolutionary legality, the Soviet jurists call the clause rebus sic stantibus "a normative value of fact, as such."³⁰ The clause rebus sic stantibus has

²⁷Schmelzing, Systematischer Grundriss des praktischen europäischen Völkerrechts (1818), II, 354; Rivier, Principes du droit des gens (Paris, 1896), I, 277; Taylor, International Public Law (Chicago, 1901), p. 401; Hall, International Law, ed. Higgins (Oxford, 1924), p. 415; Hershey, The Essentials of International Public Law and Organisation (New York, 1927), sec. 303; Fenwick, International Law (New York, 1924), pp. 49-50; Bonucci, "La clausula rebus sic stantibus nel diritto internazionale," in 4 Z.V. (1910), p. 462.

²⁸Cf. B. Pouritch, De la clause rebus sic stantibus en droit international public (Paris, 1918), pp. 53-55; M. Radolovitch, La révision des traités et le pacte de la société des nations (Paris, 1930), pp. 137-39.

²⁹Mirkine-Guetzevitch, La théorie générale de l'Etat soviétique, pp. 16, 60, 88.

³⁰E. Korvin, cited in Mirkine-Guetzevitch, "La doctrine soviétique du droit international," 32 R.G. (1925), p. 325.

been given such an extensive interpretation as to repudiate entirely the doctrine of the continuity of the state after the juridical order has undergone a profound revolutionary change.³¹ While the Soviet conception of the clause rebus sic stantibus has led her to serious conflicts with the interpretations of the rest of the world, the justification of the clause on the supremacy of fact over law is clearly inconsistent with the traditional view of international law.

The doctrine as a legal principle.--Apart from the pseudo-legal aspect of the doctrine, which would leave the execution of treaty obligations to the caprice of either party alone, there are at least some legal elements of the doctrine. The rule pacta sunt servanda which is found in every legal system must be of relative validity, because law will not enforce some promises after the occurrence of new circumstances for the purpose to give effect to either some salutary principles of justice and equity or the real intention, express or tacit, of the parties.

Some analogy has been made of the doctrine rebus sic stantibus with the rule of impossibility of performance in municipal law.³² These writers suggest that a treaty ceases to be legally binding after a change of circumstances when its execution is either physically impossible or morally impracticable. Not

³¹Ibid., p. 326. Also Korovine, "Soviet Treaties and International Law," in 22 A.J. (1928), p. 763: "Every international agreement is the expression of an established social order, with a certain balance of collective interests. So long as this social order endures, such treaties as remain in force, following the principle, pacta sunt servanda, must be scrupulously observed. But if in the storm of a social cataclysm one class replaces the other at the helm of the state, for the purpose of reorganizing not only economic ties but the governing principles of internal and external politics, the old agreements, in so far as they reflected the preëxisting order of things, destroyed by the revolution, become null and void."

³²The rule ad impossibilia nemo tenetur originated in Roman law, but this maxim had a narrow scope in classical Roman law (Rabel, "Origin de la règle impossibilium nulla obligatio," Mélanges Gerardin [1907], pp. 473 ff.). The German jurists have especially influential to develop and extend it in municipal jurisprudence (E. Kaufmann, op. cit., pp. 113-16). The development of the doctrine in common law has been discussed in MacNair, Some Legal Effects of War (1920), pp. 79-98; Dodd, "Impossibility of Performance of Contracts Due to War-Time Regulations," in 32 Harv. L. Rev. (1918-1919), pp. 789-805.

only such German writers as Gessner,³³ Hartmann,³⁴ and Ullmann,³⁵ were noteworthy for associating the doctrine with impossibility of performance, but also different writers who were uninfluenced by German jurisprudence, including Bluntschli,³⁶ Rolin-Jaequemyns,³⁷ Olivi,³⁸ and Wharton,³⁹ based the doctrine, at least in part, on an extension of the rule of supervening impossibility. The treaty was considered to be dissolved when the change of circumstances rendered its performance impracticable except at an unreasonable sacrifice. This theory has been criticized on the ground that the principle of force majeure is an independent rule of international law, which is distinguishable from the doctrine rebus sic stantibus.

Besides, the theory of laesio enormis has often been transferred from municipal law to international law to justify the doctrine rebus sic stantibus. Whether its causes be ignorance, cowardice, or corruption, the treaty, as Pinheiro-Ferreira asserted, ceases to be valid as soon as a grave injury occurs.⁴⁰ This principle is based on the reasoning that no mandatory has the right to agree with another state to the detriment of his own state which has given him a mandate to act only in the interest of the nation and not against it. Many writers however agree that an injury in the form of a mere inequality of advantages cannot give the complaining state a justifiable reason for the denunciation of a treaty. The difficulty would arise, therefore, as to the question when an injury is grave enough to terminate a

³³"Die Staatsverträge im Allgemeinen," in V. Holtzendorff, Handbuch des Völkerrecht, Vol. III, sec. 24, pp. 80-81.

³⁴Institutionen des praktischen Völkerrechts (1874), p. 154.

³⁵Völkerrecht (Tübingen, 1908), p. 285.

³⁶Das Völkerrecht der civilisierten Staaten (1878), p. 257.

³⁷"La question d'Orient en 1885-1886," 19 R.D.I. (1887), p. 46.

³⁸"D'un cas controversé de cessation de la force obligatoire des traités internationaux," 23 R.D.I. (1891), p. 607.

³⁹Commentaries of American Law, sec. 161, cited in F. Wharton, A Digest of International Law (Washington, 1886), II, 58.

⁴⁰Note in G. F. Martens, Précis du droit des gens (Paris, 1864), Vol. I, p. 55, n. 10.

treaty.⁴¹ Besides, it is still arguable that a treaty which causes grave injury would be null and void ab initio and independent of changed circumstances, if the theory of laesio enormis is carried to its ultimate conclusion.

Another analogy which has been drawn from private law is the principle that no individual can be bound by a contract of life service in perpetuity.⁴² Unlike the individuals, the states never die and therefore their obligations are more perpetual than those of individuals. It is therefore all the more necessary to admit the doctrine rebus sic stantibus in international law, because it can not be assumed that the states, or the sovereigns, are free to dispose of future destiny which is unknown to them.⁴³ The mere fact that the perpetuity of the treaty can be in no sense absolute, however, is not a proper basis for the doctrine rebus sic stantibus, inasmuch as a state can and does bind itself in such form of permanent obligations as in the case of servitudes. Can it be said that these obligations are revocable ab initio? At what interval can the perpetual obligations be terminated by the obliged party? The weakness of this theory has been attributed to its sole emphasis on the effect of the time without having satisfactory solution for the numerous cases of changed circumstances.

Some attempt has also been made to justify the clause rebus sic stantibus on the ground of public interest. In order to safeguard the general interest of community, municipal law does not enforce obligations which cause abuse of rights⁴⁴ or unjust enrichment.⁴⁵ Besides, the practice of expropriation, or the

⁴¹Cf. G. F. Martens, op. cit., I, 166; Olivi, op. cit., pp. 594-85; Neumann, Eléments du droit des gens (Paris, 1886), p. 96; Pouritch, op. cit., pp. 46-51.

⁴²Rivier cited, for example, the project of Cambacérès presented to the National Convention on August 9, 1793: "No one can engage his service to perpetuity; this stipulation, contrary to the liberty of men, is not permissible by law" (op. cit., I, 128). Cf. French Civil Code, art. 1780; German Civil Code, arts. 624, 626.

⁴³The following based, at least in part, the doctrine on the perpetuity of treaties: Brusa, cited in Olivi, op. cit., pp. 596-600; Nys, Le droit international (Brussels, 1912), II, 532; Pradier-Fodéré, op. cit., II, 502.

⁴⁴Cf. Lauterpacht, The Function of Law, p. 275.

⁴⁵Naquet associated the doctrine of imprévision, analogous

power of eminent domain, is generally recognized in public law. As private properties may be expropriated in the interest of national policy, so treaty rights, it has been suggested, must be sacrificed in the interest of a general policy of the international community.⁴⁶ The seeming analogy may be said to be inaccurate in that no pecuniary compensation, which is essential to expropriation, is practicable when a treaty ceases to exist by the clausula rebus sic stantibus.⁴⁷ Expropriation involves a change of private rights for public interests when these rights are still legally valid, whereas the treaty obligations become null and void by operation of the law after essential change of circumstances.

Certain jurists justify the doctrine rebus sic stantibus on the frustration of object which finds some analogy in municipal law.⁴⁸ It is however difficult to ascertain the object of a particular treaty. Some believe that the treaty ceases to be binding when the political object in view of which the treaty was concluded can no longer be attained.⁴⁹ For others, it is necessary not only to find the general political object of a treaty, but also to analyse the different provisions of the treaty and the particular object to each of them.⁵⁰ Disputes would arise, then, if a treaty contains conflicting objects in various provisions. Besides, the contracting parties may have changed the object of the treaty in due course of time after its conclusion.

While none of the foregoing theories appears to be an adequate description of the scope and nature of the doctrine rebus sic stantibus their cumulative effects at least prove that the

to the doctrine rebus sic stantibus, with the notion of unjust enrichment (in Sirey [1920], I, 105).

⁴⁶Lapradelle, "La question de Terre-Neuve," 11 R.D.P.S.P. (1899), p. 304.

⁴⁷G. F. Martens remarked: "The total change of circumstances, which were the cause of the agreement, renders it no longer obligatory, and there can be a question of indemnity to be offered by one who should have voluntarily caused the change" (op. cit., II, 384).

⁴⁸Cf. the doctrine of frustration in common law, infra, chap. III.

⁴⁹F. de Martens, Traité de droit international (Paris, 1833), I, 580.

⁵⁰Scelle, "La ratification de la convention de Saint-Gothard du 13 octobre 1909," 20 R.G. (1913), pp. 497-98.

doctrine is not devoid of legal elements, after its pseudo-legal character is removed. The doctrine is essentially juridical in its twofold aspects: either as a subjective rule of treaty interpretation in order to give effect to the original intention of the parties⁵¹ or as an objective principle of law in order to provide some necessary exceptions with the rule pacta sunt servanda.⁵²

The controversy over the doctrine rebus sic stantibus, it appears then, centers not so much on the fundamental question of its validity as on the possibility of its application. If the doctrine is, in the first place, taken as a simple rule of treaty interpretation, it is necessary to establish that the parties originally intended the treaty to become ineffective after an essential change of circumstances has occurred. One has to proceed on the question what is the tacit resolutive condition to a particular treaty. While an express resolutive condition may be precise as to the state of affairs which the parties have originally contemplated to terminate a treaty, it is difficult to construe a tacit resolutive condition as to what constitutes the meeting of the minds of the parties. Besides, it would have been necessary to find whether a treaty has been originally intended to be unaffected by any change of circumstances. When Hall, for instance, remarks that a treaty "not originally intended" to be inconsistent with self-preservation shall remain so,⁵³ he may be inferred to mean that there may be some treaties which were intended to be inconsistent with the right of self-preservation.

⁵¹The overwhelming majority of writers based the clause rebus sic stantibus, in whole or in part, on the intention of the parties: Klüber, Le droit des gens, ed. Ott (Paris, 1874), sec. 165; Heffter, op. cit., sec. 98; Wheaton, International Law, ed. Dana (Boston, 1866), sec. 264; Pomeroy, Lectures on International Law, ed. Woolsey (Boston, 1867), sec. 290; Phillimore, International Law (1877), II, 109; Hall, op. cit., p. 407; Fauchille, Traité de droit international public (Paris, 1924), Pt. II, pp. 333-34; Brierly, op. cit., pp. 15-16; MacNair, "The Functions and Differing Legal Character of Treaties," B.Y. (1930), pp. 109-12; Werth-Rogendanz, Die Clausula rebus sic stantibus (Göttingen, 1931), p. 75.

⁵²Some recent writers emphasize on the objective juridical character of the doctrine rebus sic stantibus independent of the original intention of the parties. See especially J. F. Williams, "The Permanence of Treaties," 20 A.J. (1929), pp. 39 ff.; Genet, "La probléme de la clause rebus sic stantibus," R.E. (1930), pp. 287-311; Wigniolle, La Société des Nations et la révision des traités (Paris, 1932), pp. 69-70.

⁵³Loc. cit.

To this class of treaties the doctrine rebus sic stantibus, if confined to its professed basis, appears to afford no remedy at all.

In the second place, if the doctrine is taken as an independent rule of objective law, it would be necessary in practice to define certain changes of circumstances which by their very nature terminate a treaty. It is necessary to determine such questions as: Shall a treaty cease to be effective in case of a conflict with the fundamental rights of a state? or with its vital interests? or with merely political and social change? or with national psychology and mental facts? Even if a comparatively small number of specific changes may be acknowledged as rendering a treaty inoperative, it may be still arguable whether these changes terminate all treaties, or only certain classes of treaties.

The Application of the Doctrine

While the jurists do not agree entirely on the scope and nature of the doctrine rebus sic stantibus, its most contentious aspect consists in the difficulty of its application. Taking for granted that the doctrine is essentially juridical, one may still disagree on the problem of its practical significance. One has to face such controversial questions as: Under what circumstances can the doctrine be invoked? To what classes of treaties can the doctrine be applied? What is the legal effect of the doctrine if it is applied? Under what procedure can it be applied?

The changes of circumstances.--Writers generally go no further than to recognize a dichotomy of changes of circumstances: essential and unessential. Some suggest as unessential changes the following: (1) the changes of circumstances which have been foreseen by the parties;⁵⁴ (2) the changes of circumstances which have been caused by the party seeking relief from the obligation;⁵⁵ (3) the changes of circumstances which the parties fail to invoke after a considerable lapse of time since its occurrence;⁵⁶ (4) such

⁵⁴In such case, it may be presumed that the parties originally intended the continued validity of the treaty in spite of changed circumstances, because otherwise an express resolatory condition could have been provided.

⁵⁵E.g. F. de Martens, loc. cit.

⁵⁶Waldkirch, Das Völkerrecht (Basel, 1926), p. 223.

minor changes of circumstances as a change of form of government of one of the parties or a mere change of government which does not affect the validity of a treaty.⁵⁷

Likewise various writers list specific changes of circumstances as terminating all treaties or at least some treaties. Vattel gave such examples as: if a prince having no issue gives the right of succession to an ally in a family pact, this is void if a son should be born to him; if a treaty of alliance is concluded in time of peace, it need not be fulfilled if any contracting party requires all his forces for self-defence; and if an alliance is made with a prince whose power is inconsiderate, one would have good reason to refuse him aid and assistance, and even to unite and act against him, if the latter should have become formidable in the height of his power so as to threaten the liberty of all Europe.⁵⁸ Heffter cited the case where the family pact was dissolved by the change of government.⁵⁹ Bluntschli considered that a treaty which is based on the fact that the population of a State is Catholic or Protestant ceases to be binding if the people changes faith, and that a treaty which depends on the monarchical or republican form of government lose its force after the change of the constitution.⁶⁰ Olivi found that a treaty relative to slavery recognized by the internal law of the contracting states ceases to be effective if one of the contracting parties recognizes the common principle of individual liberty in a new constitution.⁶¹ Very often the writers agree that the disappearance of physical object renders the performance of the treaty impracticable and terminates the treaty altogether. Hill cites these examples: if a treaty grants the right of fishing in the river of another state, it ceases to be operative in case the river dried up and never reappeared, or the disappearance of an island would terminate a treaty which binds a state to maintain a light-

⁵⁷Oppenheim, op. cit., I, 750; Hershey, op. cit., p. 453, n. 60.

⁵⁸Vattel, op. cit., sec. 296.

⁵⁹Heffter, loc. cit.

⁶⁰Bluntschli, Droit international codifié, p. 259.

⁶¹Loc. cit.

house thereon.⁶² L. H. Woolsey tentatively summarizes those types of changes of circumstances as essential, which:

Take away the very foundation of the engagement, that is, its raison d'être;

Threaten or cause the sacrifice of a state's development of its vital requirement for political or economic existence to the execution of the treaty, that is, make performance impracticable except at an unreasonable sacrifice;

Are inconsistent with the right of self-preservation, or incompatible with the independence of the state;

Modify essentially the political relations which produced political treaties, as for example treaties of alliance;

Make a treaty really inapplicable, or actually impossible of fulfillment.⁶³

While it is extremely difficult to agree on a general list of essential changes of circumstances, it is quite clear that the numerous political and social changes, with the exception of a comparatively small number, can not affect the validity of the treaty. In order to determine whether a particular change is essential or not, it follows that a classification of treaties would be necessary to determine their validity in particular case.

The limitation of its application.--The second contentious aspect of the doctrine is the question of its limitation: Whether it is applicable to all treaties alike? or only to certain classes of treaties? Firstly, while some argue that it may affect even dispositive treaties, including territorial stipulations,⁶⁴ the overwhelming majority of writers appear to admit that it may terminate only executory treaties.⁶⁵ Secondly, many writers limit the application of the doctrine to only treaties of perpetual or indefinite duration without the denunciation or revision clauses,⁶⁶ but some extend its application even to treaties of limited duration or with some resolutive condition in case a grave injury upon

⁶²C. Hill, The Doctrine of "Rebus Sic Stantibus" in International Law (Columbus, 1928).

⁶³L. H. Woolsey, "The Unilateral Termination of Treaties," 20 A.J. (1926), pp. 349-50.

⁶⁴Pouritch, op. cit., p. 76.

⁶⁵See especially Williams, op. cit., pp. 94-95; Cattand, op. cit., pp. 146-49; Oppenheim, op. cit., I, 689.

⁶⁶Anzilotti, Cours de droit international (Paris, 1925), pp. 456 ff. French translation by Gidel.

the state exists.⁶⁷ Thirdly, some recent writers intend to limit the application of the doctrine to treaty-contracts and excludes its invocation in case of treaty-laws,⁶⁸ while the earlier writers either ignored the distinction or applied the doctrine equally to law-making treaties.⁶⁹ Fourthly, it has been argued whether the doctrine is applicable to concordats which are considered by some as having the character of the treaty⁷⁰ and by others as having no other than the character of a domestic act?⁷¹

All these controversies remain as yet unsolved by a mere survey of modern writers. It appears, therefore, that if any specialization of rules is to be attained at all, one would have to analyse the judicial decisions or the practice of states.

Legal effect of the doctrine.--The writers generally fail to distinguish, much as may have been desirable, whether the application of the doctrine would render a treaty void, voidable, or merely inexpedient. Hall, for instance, regards the doctrine as causing the termination of a treaty in the sense that the latter "ceases to be binding," but at the same time he relates it also to "the condition under which a treaty becomes voidable," that is to say, "under which one of the contracting parties acquires the right of declaring itself free from the obligation under which it has placed itself."⁷² He has not attempted to distinguish a treaty which is void from what is voidable. Besides, there is some tendency for recent writers to associate the doctrine with the right of revision.⁷³ It appears that the necessity to seek of another party a revision of the treaty presupposes the rights as still existing, although inexpedient. In such case, it

⁶⁷Dupuis, "Les relations internationales," 2 R.C. (1924), p. 343.

⁶⁸MacNair, op. cit., pp. 109-12.

⁶⁹Pillet, for instance, thought that the Hague Conventions prohibiting the submarines, of ballons, and of poisonous gas may be disregarded after a vital change of circumstances (Conventions de la Haye [Paris, 1918], pp. 95-96).

⁷⁰Mérignhac, Traité de droit international (Paris, 1905), II, 126-33.

⁷¹Rivier, op. cit., secs. 49 and 55.

⁷²Op. cit., p. 407.

⁷³Hill, op. cit., p. 14.

would be contradictory to regard the doctrine as terminating the treaties.

Sir John Fischer Williams appears to have stated the doctrine with accuracy when he confines its effect to the obsolescence of the treaty. In his words:

The rule of rebus sic stantibus is not a rule giving to a State the right of its own will to tear up a treaty, but a rule either of interpretation or of law according to which in certain events the treaty has no longer any effect. It is not that one party has right to break an existing tie, but that the tie itself is already broken.⁷⁴

In brief, the application of the doctrine rebus sic stantibus renders the treaty void in the sense that it ceases to be binding after the change of circumstances.

The procedure of its application.--Not the least controversial is the problem as to the procedure required for the application of the doctrine. First, there is the anarchical principle that a contracting party has the right of unilateral denunciation at its own caprice whenever it considers the treaty to be injurious to its own interests.⁷⁵ This procedure has been commonly rejected on the ground that it would destroy in toto the maxim pacta sunt servanda. Writers generally point out that this right has never been recognized in international practice.

Secondly, cautious writers who consider the doctrine as rendering a treaty void often think it safe to lay down the rule that a treaty can be terminated only by mutual consent. In other words, the dissatisfied state must propose new negotiations to the other contracting state and cannot enjoy more than the right of request for revision.⁷⁶ No satisfactory answer has been given to such questions as: If a treaty is recognized to be no longer legally binding, what would be the procedure for the application of the doctrine in case the beneficiary party or parties should decline to consider the proposal for revision? or if the mutual consent for revision is unattainable after a prolonged negotiation? Whether the complaining state should be obliged to look upon the treaty as still existing after its unsuccessful effort to bring

⁷⁴Williams, op. cit., p. 90.

⁷⁵Heffter, op. cit., sec. 98; Kaufmann, op. cit., pp. 195-96.

⁷⁶E.g. Bonfils, Manuel de droit international (7th ed.; Paris, 1914), p. 561.

about a revision?

Thirdly, some writers seek a compromise by asserting that the complaining state must first endeavour to persuade its co-signatories that the doctrine rebus sic stantibus is applicable to a particular treaty, but if the demand is not favorably complied with, the right of unilateral denunciation is then complete for the injured party.⁷⁷ In other words, the state is made judge of its own case in the final resort and the unilateral act is justified as a political, if not juridical, remedy. The mere requirement of the preliminary procedure of request for revision does not eliminate the inherent danger of unilateral denunciation which would minimize the binding force of treaties.

Fourthly, the recent writers who emphasize the importance of international adjudication find a legal remedy for the application of the doctrine rebus sic stantibus. It is suggested that the doctrine does not terminate a treaty de plein droit, but the latter may be nullified by two alternatives only: either by mutual consent of the parties or by the declaration of an international authority.⁷⁸ The problem lies with the absence of a well-recognized international authority to enforce the doctrine. It has been argued whether the Permanent Court of International Justice is a proper organ to adjudicate over the disputes over the doctrine even if the parties in dispute are bound by the optional clause. Sir John Fisher Williams believes that the question whether the doctrine itself is part of International Law is a question of International Law coming within the meaning of the optional clause. The question whether a treaty has become obsolete in a given case involves questions of fact and the question whether the changes are material as to make a treaty obsolete is a mixed question of law and fact. These questions do not fall within the optional clause and can be settled by international conciliation rather than by the Court.⁷⁹ Genet takes the contrary view in considering that the fact of this kind falls in exactly with section (c) of the optional clause, for the Court is

⁷⁷ Scelle, op. cit., in R.G. (1913), p. 499; Garner, op. cit., in 21 A.J. (1927), pp. 515-16; Oppenheim, op. cit., I, 692.

⁷⁸ Williams, op. cit., p. 91; Genet, op. cit., pp. 301-02.

⁷⁹ Op. cit., p. 100.

confronted with the task to ascertain the existence of a fact which, if established, constitutes the violation of international obligations.⁸⁰ It may be suggested, however, that the Court may enforce the doctrine in an interpretation of treaties under section (a) of the optional clause. Once it is admitted that the general question of the doctrine may be appropriately decided by the Court, it is not necessary to give up half-way, as Sir John Fisher Williams does, the application of the doctrine by judicial procedure and introduce the conciliatory procedure. The doctrine, if accepted by the Court as a principle of international law, must be judicially applied in order to ascertain whether a treaty exists under certain changed circumstances either according to the intention of the parties or according to the objective rule of law which may be presumed to be the intention of the parties.

Lastly, while the final recourse for the application of the doctrine necessarily rests with either the agreement between the parties or the judgement of an international authority, the complaining party may unilaterally suspend the treaty so far as executory at its own risk as a preliminary measure. If the obsolescence of the treaty is not established later by the agreement between the parties or by an international authority agreed upon, unilateral suspension would result in an international delinquency which must be made good. This proposal would conceivably prevent the recalcitrant beneficiary to the treaty from avoiding or delaying submission of the dispute to an international adjudication or from opening up negotiations or the possible injury upon the complaining party even after the parties have agreed upon the tribunal, if considerable time has to lapse pending a decision. It appears that the exercise of the right of unilateral suspension would be conditioned by the merits of the particular case as well as by the relative political strength of the states.

Conclusions

To summarize, the doctrine rebus sic stantibus, purged from its pseudo-legal connotations, is essentially juridical. It is to be conceived as either a subjective rule of interpretation or an objective principle of law, according to which a treaty

⁸⁰Op. cit., p. 304.

becomes obsolete in the sense that it ceases to be binding after the occurrence or disappearance of essential circumstances. It appeals to either the real intention of the parties or the normative rule of law. There is no substantial difference in these views, for there is a presumption that the parties intend that their action should be governed by the rule of law, if it is clearly understood.

The difficulty lies with the lack of rules of specialization for the application of the doctrine. Writers do not agree as to what constitute essential and unessential changes of circumstances respectively, as to the limitation of the application of the doctrine to different classes of treaties, as to its legal effects if the doctrine be applied, or as to the procedure of its application. Thus, the doctrine is so far devoid of any practical value, although intrinsically juridical and sound. So far as we can discover, the doctrine is still a principle de lege ferenda which can be established as a positive rule of international law only if some rules of specialization be further developed to define more clearly and precisely the practical aspect of its application.

CHAPTER VIII

TREATY MODIFICATION UNDER THE LEAGUE COVENANT

The change of treaty rights by the extra-legal intervention of the international community as a whole was only exemplified in Utopian ideas until the establishment of the League of Nations. Most of the early builders of idealistic commonwealths alluded to the problem of change even though their emphasis was on world stability. The pax universalis of Dante envisaged stability by the elimination of all international relations as a result of the creation of a universal empire, but the emperor was entrusted with the legislative power which might become a useful instrument of change.¹ An idealistic thinker as well as a practical statesman, Sully saw the necessity of change in the establishment of a Great Council "for the introduction of reforms, such as time renders needful in the wisest and most useful institutions."² Crucé attempted to substitute International Arbitration for War as an instrument of change. Besides, he conceived of an assembly composed of ambassadors of all sovereigns and "the said princes will swear to hold as inviolable law what would be ordained by the majority of votes in the said assembly, and pursue with arms those who would wish to oppose it."³ St. Pierre thought mainly of perpetuating the status quo by the establishment of an alliance system which would minimize the importance of change "by reason of the fixed and immutable principle of actual possession and execution of treaties."⁴

In practice, the extra-legal intervention of the international community in the past generally took the form of action by the Concert of Europe or by a combination of certain Powers who had special interests in a change. Thus, after the Treaty of

¹De monarchia i. 11.

²Darby, International Tribunals, 3d ed., p. 10.

³Balch, Le Nouveau Cynée de Eméric Crucé, p. 122.

⁴Abregé du projet de paix perpétuelle, Grotius Society Publication No. 5 (1927), pp. 27-28.

San Stefano of March 3, 1878, the Powers, with their political interests and legal claims, were disinclined to accept the fait accompli but met in the Congress of Berlin to revise the instrument on the ground of the higher interest of the international community.⁵ In the same light may be considered the intervention of the Dreibund for the retrocession of the Liaotung Peninsula to China after the peace treaty of Shimonoseki, 1895, on the ground that "its possession by Japan would be a menace to Peking, and render illusory the independence of Korea."⁶ In the former case, the Great Powers acted collectively to revise a treaty inconsistent with public interest; in the latter case, only political pressure was exercised upon the contracting parties to "recommend" such change in the terms of the treaty as was deemed necessary for the maintenance of balance of power. All in all, the extra-legal intervention of the international community was not a definitely established institution but rested with the political consideration of the Great Powers. Whenever no vital interests of the Great Powers were involved, little was done to rectify the treaty relations between two states, however obsolete they might be.

Only with the establishment of the League of Nations was the problem of international change emphasized as a matter of international concern. The right of intervention in behalf of the international community is entrusted no longer to the caprice of the Great Powers, but to the League as a whole. It is our purpose to consider in this chapter the significance of the League as an agency for the modification of obsolete treaties.

Genesis of Article 19

Historically Article 19 degenerated from what the Framers of the Covenant had designed to be a procedure of international legislation. The article was essentially the work of the Anglo-Saxons. In the Draft of Colonel House, July 16, 1918, Article 20 read:

The contracting Powers unite in several guarantees to each other of their territorial integrity and political independence, subject, however, to such territorial modifications,

⁵White, "The Status in International Law of the Ottoman Empire," Unpublished Doctor's thesis, Department of Political Science, University of Chicago, 1935, p. 96.

⁶H. B. Morse and H. F. MacNair, Far Eastern International Relations (New York, 1931), p. 408.

if any, as may become necessary in the future by reason of changes in present racial conditions and aspirations pursuant to the principle of self-determination and as shall also be regarded by three-fourths of the Delegates as necessary and proper for the welfare of the peoples concerned, recognizing also that all territorial changes involve equitable compensation and that the peace of the world is superior in importance and interest to questions of boundary.⁷

The provision was adopted, with slight modification in Wilson's First Draft and in his Second Draft or First Paris Draft, January 10, 1919. Article 3 provided:

The contracting Powers unite in guaranteeing to each other political independence and territorial integrity; but it is understood between them that such territorial adjustments, if any, as may in the future become necessary by reason of changes in present racial conditions and aspirations or present social and political relationships, pursuant to the principle of self-determination, and also such territorial readjustments as may in the judgement of three-fourths of the Delegates be demanded by the welfare of the manifest interest of the peoples concerned, may be effected, if agreeable to those peoples; and that territorial changes may in equity involve material compensation. The contracting Powers accept without reservation that the peace of the world is superior in importance to every question of political jurisdiction or boundary.⁸

Thus, the first part of the article provided only the common guarantee of territorial integrity and political independence, but the latter part had a revolutionary character of introducing into international law a new procedure of international legislation. The Assembly by a majority of three-fourths of the Delegates was empowered to effect a territorial readjustment by modifying a treaty if they should consider it desirable in the interest of the people after a change of social or racial conditions and aspirations or even political and social relationships. This was not the clause rebus sic stantibus in law, but a clear act of legislation. The clause rebus sic stantibus is concerned only with a legal dispute, that is, only with a right that has already ceased to exist in law either by reference to the intention of the parties or to a superior normative principle of justice. Article 19, on the other hand, deals with a political conflict, that is, with a conflict which contemplates a change of the existing law itself.

⁷D. H. Miller, The Drafting of the Covenant (New York, 1928), II, 10.

⁸Ibid., p. 12.

The British Draft Convention of January 20, 1919, did not accept such a radical proposal but modified it in the following terms:

If at any time it should appear that the boundaries of any state guaranteed by Article I (1), (11) do not conform to the requirements of the situation, the League shall take the matter under consideration and may recommend to the parties affected any modification which they may think necessary. If such recommendation is rejected by the parties affected, the States members of the League, shall, so far as the territory in question is concerned, cease to be under the obligation to protect the territory in question from forcible aggression by other States, imposed upon them by the above provision.⁹

The British Draft only authorized the League to make a recommendation in case of a necessity for revision. The Assembly had no right to effect the revision itself. There was further no positive sanction in case the recommendation should be neglected by the parties in dispute for the only result was that the League's guarantee against forcible aggression should immediately cease.

The British amendment was reconciled with Wilson's Draft in the Cecil-Miller Project, January 27, 1919, and therein Article 3 contained the following passages in the second and third paragraphs:

If at any time it should appear that any feature of the settlement made by this covenant and the present treaties of peace no longer conforms to the requirements of the situation, the League shall take the matter under consideration and may recommend to the parties any modification which it may think necessary. If such recommendation is not accepted by the parties affected, the States, members of the League, shall cease to be under any obligation in respect of the subject matter of such recommendation.

In considering any such modification the League shall take into account changes in the present conditions and aspirations of peoples or present social and political relationships, pursuant to the principle, which the High Contracting Powers accepted without reservation, that Government derive their just powers from the consent of the governed.¹⁰

Upon the proposal of Hurst, these two paragraphs were omitted in Article 7 of the Hurst-Miller Draft which finally became Article 10 of the League Covenant.¹¹ It was, however, in connection with the guarantee clause that the necessity of a collective procedure for treaty revision was again brought into

⁹Ibid., p. 107, chap. 1, art. 11.

¹⁰Ibid., p. 134.

¹¹Ibid., I, 168-69.

lively discussion. In the Fourth Meeting, Cecil proposed to insert into the guarantee clause the wording: ". . . subject, however, to provision being made by the body of delegates for the periodic revision of treaties which have become obsolete and international conditions, the continuance of which may endanger the peace of the world."¹² This was made in the Eighth Meeting a new article which ran as follows: "The Body of Delegates shall make provision for the periodic revision of treaties which have become obsolete and international conditions, the continuance of which may endanger the peace of the world."¹³

The foregoing article was criticized by Miller in a Memorandum to Colonel House dated February 9: "If this article means that the Body of Delegates have any power beyond that of recommendation, it is bad. If it means that they have only powers of recommendation, it should say so."

Consequently, he suggested to substitute the words "shall make recommendation as to" for the words "shall make provision for."¹⁴ Likewise Mr. Kramar, the Czecho-Slovakian Delegate, raised the objection that "if the Body of Delegates were to become the judge of all treaties, it should have powers like those of an international Parliament."¹⁵ Finally, the commission accepted the amendment of President Wilson: "It shall be the right of the Body of Delegates from time to time to advise the reconsideration by the States, members of the League, of treaties which have become inapplicable, and of international conditions, the continuance of which may endanger the peace of the world."¹⁶

The present Article 19 retains, in substance, the wording of the Wilson draft.

It is possible to adduce from the historical analysis these points:

(1) Article 19 was not projected to establish a true international legislature. The original Wilsonian idea to establish an international legislature for the purpose of enforcing the principle of self-determination and modifying obsolete treaties as a result of changed conditions which appeared in the First Paris draft was immediately abandoned upon the British

¹²Ibid., II, 264, 550.

¹³Ibid., p. 556.

¹⁴Ibid., I, 202.

¹⁵Ibid., II, 288.

¹⁶Ibid., I, 203, 205; II, 288-89.

amendment of January 20, 1919. The change of the attitude of President Wilson was still more manifest when he substituted in the last stage the words "to advise the reconsideration by the States" for the words "make provision for the periodic revision of treaties." In other words, a conciliatory rather than a legislative body was created in the mind of the framers of the Covenant.

(2) Article 19 aimed chiefly at a solution of the problem of the peace treaties, especially the territorial settlements. In the earlier drafts this article was joined with what became finally Article 10 of the Covenant. While these articles were separated, their relationship appeared to be close. The wording of Article 19 is broad enough to empower the assembly to advise reconsideration of coercive treaties whenever necessary.

Application of Article 19

Whatever may have been the expectations of the Framers with respect to Article 19, the procedure has never been successfully invoked to terminate or revise any obsolete treaty. Some writers speak with optimism:

It was really surprising that it had not yet been used. . . . It was very far, for that reason, from having been a "Dead Sea Apple." By its nature it must be one of the long-period developments of the institutions of the League which had to control the relations between the States.¹⁷

In those instances in which this article has been invoked the dissatisfied party found the procedure unworkable.

Disputes between Chile, Bolivia, and Peru.--As soon as the Assembly was in its first session, the Bolivian Delegation proposed to include in the agenda that "Bolivia invokes Article 19 of the Treaty of Versailles with a view to obtaining from the League of Nations the revision of the Treaty of Peace signed between Bolivia and Chile on October 20, 1904."¹⁸ As a result of that treaty Bolivia was entirely shut off from access to the sea. Peru immediately joined with Bolivia to request the Assembly "to reconsider and revise" the Treaty of 1883 between Peru and

¹⁷Statement of Philip Baker, League of Nations, Records of the Tenth Assembly, Plenary Meetings, p. 46.

¹⁸League of Nations, Records of the First Assembly, Plenary Meetings, 1920, p. 595.

Chile.¹⁹ The Peruvian request was withdrawn on December 2,²⁰ but the Bolivian Delegation demanded that the question should be placed on the agenda of the next session of the next Assembly.

In the Fifth Meeting of the Second Assembly, the Chilean Delegate objected to put the Bolivian request on the agenda on the ground: "We base our opposition upon a conclusive reason: the absolute and radical incompetence of the League itself to revise treaties, and especially treaties of peace."²¹

Further, he argued:

Article 19 contemplates only treaties which become inapplicable. Now how can it possibly be maintained that the treaty of 1904, a treaty applied and observed in its entirety for the last seventeen years, is an inapplicable treaty.²²

In the third Plenary meeting of the Assembly, the president declared that a Committee of Jurists were appointed to give opinion on the Powers of the Assembly under Article 19 of the Covenant. The findings were as follows:

That, in the present form, the request of Bolivia is not in order because the Assembly of the League of Nations cannot of itself modify any treaty, the modification of treaties lying solely within the competence of the Contracting States.

That the Covenant, while insisting on scrupulous respect for all treaty obligations in the dealing of organized peoples with one another, by article 19 confers on the Assembly the power to advise [the French word in the Covenant is "inviter"--that is to say "invite"] the consideration by Members of the League of certain treaties or the consideration of certain international conditions.

That such advice can be given in cases where treaties have become inapplicable--that is to say, when the state of affairs existing at the moment of their conclusion had subsequently undergone, either materially or morally, such radical changes that their application has ceased to be reasonably possible, or in cases of the existence of international conditions whose continuance might endanger the peace of the world.

That Assembly would have to ascertain if a case arose whether one of these conditions are in point of fact exist.²³

The Bolivian delegation was faced with these findings and immediately withdrew its request for the treaty revision. It reserved, however, "the right to submit its demand afresh to the League of Nations, in accordance with the principles and form laid down by the Covenant and at the time when it considers most desirable."²⁴ In short, the first appeal to Article 19 of the

¹⁹Loc. cit.

²⁰Ibid., p. 580.

²¹Ibid., 1921, p. 45.

²²Ibid., p. 47.

²³Ibid., p. 446.

²⁴Ibid., p. 468.

Covenant was a failure, due to the ambiguity of the wording of the article, the improper framing of the request by the party invoking the article and the reluctance of the League to perform its hazardous task. The Report of the Jurists, however, contributed to the clarification of the competence of the Assembly for the treaty revision.

The Declaration of September 22, 1925.--In the Sixth Plenary Meeting of the Sixth Assembly, the Chinese Delegate Chu Chao-Hsin addressed the Assembly:

Permit me to call your attention to China's appeal for the reconsideration of her Treaty relations with other Powers. I bring this question before the Assembly, because it falls within the letter and spirit of the Covenant of the League, particularly Art. 19. . . .²⁵

In the Meeting of September 2, a recommendation proposed by the Chinese Delegation was adopted which expressed "the keen interest" of the League in the suggestion of the Chinese Delegate regarding the possibility to consider in the spirit of the Covenant, the actual international situation in China.²⁶ Thus, although the Chinese Delegate, in this case, attempted to make use of Article 19 to support the case for treaty revision, he did not express the intention of requesting the Assembly to advise the other Powers having treaty relations with China to reconsider these treaties as being inapplicable.

Resolution of September 25, 1929.--Another move was made by China in the Twelfth Meeting of the Tenth Assembly. The Chinese Delegate Wu Chao-chu proposed a resolution that "there shall be appointed a Committee to consider and report the best methods to make effective the above-mentioned article."²⁷ The resolution proposed by the First Committee was adopted by the Assembly, which

Declares that a Member of the League may on its own responsibility, subject to the Rules of Procedure of the Assembly, place on the agenda of the Assembly the question whether the Assembly should give advice as contemplated by Article 19 regarding the reconsideration of any treaty or treaties which such Member considers to have become inapplicable or the consideration of international conditions the

²⁵League of Nations, Records of the Sixth Assembly, 1925, p. 44.

²⁶Ibid., p. 102.

²⁷League of Nations, Records of the Tenth Assembly, Plenary Meetings, 1929, p. 108.

continuance of which might, in its opinion, endanger the peace of the world;

Declares that, for the application of this kind to be entertained by the Assembly, it must be drawn up in appropriate terms, that is to say, in terms which are in conformity with article 19;

Declares that, in the event of an application in such terms being placed upon the agenda of the Assembly, the Assembly shall, in accordance with its ordinary procedure, discuss this application, and if it thinks proper gives the advice requested.²⁸

The 1929 resolution appears to go a good deal beyond the report of the Committee of Jurists, 1921, because under the new resolution a Member may always on its own initiative submit any treaty to the Assembly which would have to decide whether the treaty is inapplicable. The well-wishers of the League generally emphasized the importance of the 1929 resolution. The Belgian Delegate, M. Rolin, well expressed this point of view:

In view of the essential political character of Article 19, it did not seem wise, if it were desired to make it possible to apply that article when necessary, for the Assembly to further the framing of rules which would tie its hands, especially as numerous difficulties would be encountered in the process. If the existence of Article 19 were recognized, its importance, and the possibility, which every State Member of the League possessed, of causing, upon its own responsibility, that article to be applied in any particular case, all that could be done in the existing circumstances would have been done, and, he thought, all the satisfaction which those countries that were particularly anxious about would have been given to them.²⁹

While the 1929 resolution, of course, was of general application, its relationship with the "unequal" treaties in China was recognized. The Chinese Delegate Wu Chao-chu gave the motive of the draft resolution:

The Chinese Delegation envisaged particularly those 'unequal' treaties and conventions with whose general outline the Committee was doubtless familiar under which China laboured. If it could be said of any treaties that they had become inapplicable, it could be said of those.³⁰

The Chinese viewpoint was partially recognized in the resolution:

²⁸ Ibid., p. 177.

²⁹ League of Nations, Tenth Assembly, Minutes of the First Committee, p. 45. Cf. the statement of Prof. Baker, ibid., p. 46.

³⁰ Ibid., p. 44.

Having taken cognizance of the declaration by the Chinese Declaration that certain treaties formerly concluded between China and other states, being inconsistent with present conditions in China, have become inapplicable within the meaning of Article 19 of the Covenant;

Appreciating the importance of the points as to which the Chinese Delegation feels concern. . . .³¹

In fact, the reference to the Chinese delegation in the two first paragraphs of the resolution was retained, in the opinion of the Rapporteur, M. Pilotti, because "The examination of Article 19 had, in fact, been undertaken at the instance of the Chinese Delegation."³²

In this case, China succeeded in removing some of the ambiguity of Article 19 so as to render it useful, although the variety of interpretations of other states in regard to the resolution, limited its effects. In respect to the question of "unequal" treaties, China attempted in 1929, as in 1925, only to create a favorable impression in an international forum in order to facilitate her own effort of treaty revision but made no definite move to request the consideration by the Assembly of these treaties as being "inapplicable."

The statement of Persia.--At the Twelfth Plenary Meeting of the Ninth Assembly in 1928, H. H. Mohammad Ali Khan Foroughi declared that "the Persian Government has abrogated the treaties conferring legal privileges on foreigners in Persia, which not only encroached upon the independence of the juridical system, but placed Persians in a position of inferiority in their own country," and that this policy was "based on Article 19 of the League Covenant, which advises the reconsideration of treaties which have become inapplicable."³³ This statement was far from invoking the procedure under Article 19, but served as a diplomatic

³¹ Ibid., pp. 99-100; also Records of Tenth Assembly, Plenary Meetings, p. 177.

³² League of Nations, Tenth Assembly, Minutes of the First Committee, pp. 54-56; League of Nations, Tenth Assembly, Journal, pp. 383-84.

³³ League of Nations, Ninth Assembly, Verbatim Record, Twelfth Plenary Meeting, p. 10. In 1929, M. Sepahbady of Persia declared his sympathy with the Chinese proposal: ". . . . the more so because the Persian Government itself had acted in the spirit of Article 19 in annulling treaties which no longer answered to existing conditions" (League of Nations, Tenth Assembly, Minutes of the First Committee, p. 46).

pressure. The abrogation of the capitulations in Persia was effected by the conclusion of the new treaties.

The Four-Power Pact, 1933.--The attempt to make Article 19 effective was one of the main purposes of the original Italian draft of a European Four-Power Pact, 1933, which aimed at the transference of treaty revision from the League to a Four-Power group. The Italian draft suggested that the Four Powers adopted a common and joint policy and "the principle of revision" could not "be applied except within the framework of the League and in a spirit of mutual understanding and solidarity of reciprocal interests."³⁴ Great Britain objected on the ground that "though it referred to the possibility of revision of treaties, it made no reference whatever to the corresponding obligation of the Covenant, namely, recognition of the sanctity of treaties." The British counter draft embodied "the proposition, which is in the Preamble of the Covenant, namely, that there must be scrupulous respect for treaties, side by side with the other proposition, which is equally in the Covenant that the Covenant envisages the possibility, under certain conditions, of treaty revision."³⁵ France disliked the emphasis on the principle of revision but thought that it was no less important to implement articles 11, 12, 15, 16, than to implement article 19.³⁶ The little Entente Powers gave vent to their interpretation of Article 19: "Frontier alterations are only possible by direct agreement between the states concerned within the framework of article 19 of the League Covenant." This was followed by a qualification that a "minor alteration or adjustment of the treaty frontiers" might be effective under three conditions:

(a) There must be no external pressure. . . . Agreement can only be reached by direct negotiation between the peoples interested and with their free consent given in accordance with their constitutional laws. This is true of any application of article 19 of the Covenant, since that article assumes the agreement of the interested states.

(b) Such an agreement is only possible in an atmosphere

³⁴Art. 11. For the four successive draft texts of the Four-Power Pact,--the Mussolini draft of March, 1933, the British draft of April 1, the Daladier draft of May, and the final text of June, see Documents on International Affairs, 1933, pp. 240-49.

³⁵Survey of International Affairs, 1933, p. 212.

³⁶Ibid., p. 214.

of calm after some years of peaceful co-operation between the peoples concerned. . . .

(c) Such an agreement is only possible if equivalent compensation is given, so that the interests of both parties are fully respected and the Parliament and public opinion can give their free consent.³⁷

The final draft which was later signed reduced the principle of revision to lip service and reaffirmed with equal respect Articles 10, 16, and 19 of the Covenant of the League. Germany expressed its dissatisfaction by an immediate withdrawal from the Disarmament Conference and a notice of its intention to secede from the League. The Italian Fascist Grand Council resolved on December 6, 1933, that "the continued collaboration of Italy with the League of Nations shall be conditioned upon the radical reform of the League in its constitution, organization, and objective within the shortest possible time."³⁸

In short, the attempt of a revisionist state to give reality to Article 19 of the Covenant was apt to be looked upon as an attack upon the Covenant by the status quo states. The formal defence of the Covenant against this alleged attack had given opportunity for the status quo states to limit the application of Article 19. They insisted that the principle of revision should in no way be overemphasized so as to minimize the sanctity of treaties.

Juridical Analysis of Article 19

The first controversial question that often arises as to the legal character of Article 19 is whether it embodies in essence the clause rebus sic stantibus. One may inquire: whether Article 19 rejects the doctrine? whether it is not quite as extensive as the doctrine? whether it is identical with the doctrine? or whether it is more extensive than the doctrine?

Some writers consider that Article 19 vetoes the doctrine altogether, because it interdicts a state from liberating itself from treaty obligations by a unilateral act.³⁹ However, on the

³⁷ Ibid., p. 219.

³⁸ Ibid., p. 223.

³⁹ Ulléin, Nature juridique des clause territoriales du Traité de Trianon, p. 118; Strupp, Eléments de droit international, I, 468.

view which we have assumed that the doctrine rebus sic stantibus does not justify the right of unilateral denunciation, there is no reason to believe that Article 19 denies the doctrine. While Article 19 precludes, in effect, the unilateral denunciation of treaties, it does not object pari passu to the judicial application of the doctrine rebus sic stantibus to terminate a treaty either as a result of the agreement of the parties or the verdict of an international authority.

Some writers treat of Article 19 as not quite as extensive as the doctrine rebus sic stantibus, because a treaty, which the change of circumstances renders no longer legally valid, may remain perfectly applicable, if the contracting parties choose to leave it intact.⁴⁰ It remains for us to consider later whether the word "inapplicable" is used in this sense.

Still others identify the doctrine rebus sic stantibus with Article 19. For them, the term "inapplicable" means "inexecutable," by consequence of a fact independent of the will of the parties. A mere difficulty of execution is not equivalent to "inexecutable," which means "impossibility of execution" not caused by the acts of the contractants.⁴¹

In our view, Article 19 is more extensive than the doctrine rebus sic stantibus. This conclusion is supported by the official statements of the League. The Report of the Commission of Jurists, 1921, interpreted extensively the term "inapplicable" by asserting that a treaty is "inapplicable" when after a change of circumstances, moral or material, it has ceased to be "reasonably possible" of execution.⁴² Paragraph 3 of the 1929 resolution, in effect, permitted the Assembly to declare a treaty "inapplicable" on political ground; namely, the continuance of international conditions which endanger world peace.⁴³ It may be inferred, therefore, that the Assembly may under Article 19 reconsider not only those treaties which have become legally obsolete by reason of absolute impossibility of execution, but also those which have become inexpedient. In other words, Article 19 aims to afford a

⁴⁰Genet, "Le problème de la clause rebus sic stantibus," R.G. (1930), p. 288.

⁴¹D. Fauchille, Traité de droit international public (Paris, 1926), Vol. I, Pt. III, p. 9; Raïdoïkovitch, La révision des traités et le pacte de la Société des Nations (Paris, 1930), p. 240.

⁴²Supra, n. 23.

⁴³Supra, n. 28.

political, and not a legal, remedy. As Dr. Lauterpacht well puts it:

A treaty may become obsolete, oppressive, and out of accord with postulates of justice, or with political and economic conditions, and yet it does not necessarily come within the scope of the legal application of the *clausula*. The remedy is here obviously a political one and it lies within the competence of the international legislature, but not of international justice.⁴⁴

The correct synonym of the word "inapplicable" is then "unsuitable," or rather "out of date."⁴⁵ The term purports to apply indiscriminately to different types of treaties, no matter whether they create real or personal rights, or are of contractual or law-making character. It cannot be argued that the treaties which transfer real rights after having been executed, or "applied and observed," cannot become "inapplicable."⁴⁶ If these treaties have become "out-of-date," or endanger world peace, Article 19 is clearly applicable, judged by the intention of the Framers of the Covenant indicated by the documents which we have surveyed. However, it is not to be assumed that Article 19 can be of much value in the case of "unapplied" treaties which have not been applied. If such treaties are found to be "inapplicable," they must have been "inapplicable" ab initio, but different from those "have become" inapplicable.⁴⁷

The second question which we may consider is the procedure under Article 19. Some writers advocate that the principle of the majority may be applied to Article 19, for the advice being not a decision but having the character of a voeu may be voted by the

⁴⁴Private Law Sources and Analogies (London, 1927), p. 174.

⁴⁵League of Nations, Tenth Assembly, Minutes of the First Committee, pp. 44, 46, 55.

⁴⁶The Chilean Delegate argued in 1921: "Article 19 contemplates only treaties which become inapplicable. Now, how can it possibly be maintained that the Treaty of 1904, a treaty applied and observed in its entirety for the last seventeen years, is an inapplicable treaty" (Records of the Second Assembly, Plenary Meetings, pp. 45 ff.).

⁴⁷Fauchille gave the following opinion in 1921: "We ought, on the other hand, to be very careful of likening to an applicable treaty a treaty which the parties have not executed, the latter is an unapplied treaty and not an inapplicable treaty." Cited in Goellner, La revision des traités sous la régime de la Société des Nations, p. 76.

majority rule.⁴⁸ This opinion has been refuted by the overwhelming majority of writers, for an advice of such kind involves a declaration by the Assembly of the inapplicability of the treaty and the importance of this function requires the votes of more than a bare majority.⁴⁹ Still some writers suggested the rule of "qualified" unanimity on the ground that it is inconceivable that the party in dispute would agree to a declaration that the treaty has been inapplicable. Furthermore, it was argued that if the parties can agree, there will be no need of the intermediary of the League.⁵⁰ The overwhelming majority appears to assert that the advice under Article 19 may only be given by the absolute unanimity stipulated in Article 5.⁵¹ This view has been approved by the official documents of the League. In the dispute between Chile and Bolivia, the Chilean delegate declared that:

According to paragraph 1 of Article 5 of the Covenant, such advice must be tendered unanimously, including the assent of the interested parties; consequently, such advice cannot be tendered against their will. This interpretation of Article 5 is confirmed by the fact that wherever the Covenant intends that the votes of the interested parties shall not be taken into consideration, it expressly says so.⁵²

This point of view seems to have been accepted in the resolution of 1929 which declares that the advice shall be given in accordance with the "ordinary procedure" of the Assembly.⁵³ It is clear that no exception of the unanimity rule has been made in regard to the procedure of voting under Article 19.

The third question to be considered is the legal effect of the advice given by the Assembly under Article 19. It is clear

⁴⁸Schucking and Wehberg, Die Satzung des Völkerbundes, 2d ed., pp. 335, 663; Goellner, op. cit., p. 86; Fabian Society, Memorandum on Revision of Treaties and Changes in International Law, p. 8; Hershey, International Law and Organisation (1927), p. 520, footnote.

⁴⁹J. F. Williams, "The League of Nations and Unanimity," A.J. (1925), p. 482.

⁵⁰Wigniolle, La Société des Nations et la révision des traités (Paris, 1932), pp. 234 ff.

⁵¹L. Oppenheim, International Law, ed. MacNair, I (1928), 342; Hall, International Law, ed. Higgins (1924), p. 407; A.D. MacNair, "La termination et dissolution des traités," R.C. (1928), pp. 447-80; Raïdoikovitch, op. cit., pp. 269-70.

⁵²League of Nations, Records of the Second Assembly, Plenary Meetings, 1921, p. 50.

⁵³Supra, n. 28.

that the "advice" is not legally binding upon the contracting states.⁵⁴ Under no circumstance can the Assembly undertake treaty revision itself or make definite proposals regarding the revision.⁵⁵ It rests entirely with the contracting parties to agree on the basis of revision. In case the parties cannot agree to what extent the treaty is "inapplicable," there appears to be no remedy.

Proposed Amendment of Article 19

Many writers have criticized the existing procedure under Article 19. Higgins calls it "cumbersome";⁵⁶ Oppenheim terms it hardly "such as to inspire confidence."⁵⁷ One of the reasons for the rejection of the Geneva Protocol by Great Britain and other states was the inadequacy of the machinery under Article 19 to prevent the territorial status quo from becoming a stereotyped anachronism, which a treaty of general guarantee would tend to establish.⁵⁸

Modern writers generally recognize that treaty sanctions necessitate the existence of pacific machinery for revision.⁵⁹ Proposals for modification of Article 19 in academic discussions have been polemic. In order to make Article 19 effective, it seems that amendments must be adopted in the future regarding (1) the rule of unanimity and (2) the sanction of the "advice." In the first place, amendment to the Covenant may be introduced to exclude the votes of the interested states under Article 19.⁶⁰

⁵⁴As Sir John Fisher Williams puts it: "Even if the Assembly (with the exception of the parties interested) is unanimous in advising the reconsideration of a treaty the pressure applied to the recalcitrant contracting power is moral pressure only; no legal obligation to revise the treaty has been created" ("The Permanence of Treaties," A.J. [1928], p. 103).

⁵⁵E.g., M. Pilotti, rapporteur of the 1929 resolution, explained: "As regards the object of the Assembly's resolution, it should be merely to give that advice" (L. of N.O.J., Special Suppl., No. 76, p. 54).

⁵⁶In Hall, op. cit., p. 407.

⁵⁷Op. cit., I, 692.

⁵⁸Ibid.

⁵⁹E.g., Wilde, Treaty Sanctions and Enforcement, chap. 1.

⁶⁰Wright and Kidd, "Reform of the League of Nations," Geneva Special Studies (1934), pp. 5, 8, 32.

Only by "qualified" unanimity could any advice for reconsideration of an "inapplicable" treaty be adopted without being blocked up by a party recalcitrant to the change. In the second place, the sanction of the advice might be provided by the conclusion of a general convention among the states to give the World Court a new power of eminent domain. After the adoption of the advice, the League as a whole might be allowed to institute proceedings before the Court against any state failing to take notice of the advice, and the Court might be entitled to change the existing rights to correspond to the advice on finding that the change is in the general interest and that just compensation has been given to the party who is deprived of rights.⁶¹

It must be admitted that the conflict of policies between the status quo states and the revisionist states proves to be a stumbling-block to any such drastic amendment of Article 19. The future progress of the machinery hinges on the shifting of the power-politics considerations of modern states as well as the innovation of new political ideologies and symbols.

Other Avenues of Change

While Article 19 in its actual working is not effective, it remains for us to find whether the present peace organization provides other useful methods for treaty change. Within the framework of the League the conciliation and mediation functions of the Council may conceivably contribute to the process of change. Article 11 authorizes the Council to take measures for the prevention of war while Article 15 leaves the way open for recommendations in the direction of treaty change.⁶² The commission of inquiry may likewise prove useful for minor territorial adjustments. Both in the Mosul dispute of 1925 and the Manchurian crisis of 1932, the commissions of inquiry set up suggested important territorial changes and these recommendations were accepted by the League. In the Mosul case, the recommendation was accepted by the parties and settled the dispute, but in the Manchurian case it was rejected by Japan. In 1930, the Council

⁶¹Wright, "Article 19 of the League Covenant and the Doctrine of *Rebus sic stantibus*," in Proceedings of the American Society of International Law (1936), p. 72.

⁶²Cf. Conwell-Evans, The League Council in Action, pp. 10-15.

of the League appointed a Committee of Jurists to bring the Covenant in line with the General Pact for the Renunciation of War. It was proposed in the report of the committee that a recommendation of the Council adopted by the rule of qualified unanimity should be considered as binding upon the parties in the dispute.⁶³ With such a change it appears that the Council would be given ample power of international legislation whenever international change is necessary. The Legal Committee of the Eleventh Assembly however rejected this proposal. Thus, within the framework of the League of Nations, it is clear that no compulsion can be found to effect political change. The function of the League machinery is advisory and conciliatory, but not legislative.

While non-members of the League, under Article 17 of the Covenant, may make use of the conciliatory and mediatory function of the Council, consultation under the Renunciation of War Pact might provide a more efficacious method for the preservation of peace.⁶⁴ Such ad hoc consultations as are implied in the Kellogg Pact have, however, proved ineffective. In order to avoid serious difficulties and inevitable delay, it has been suggested that "a general agreement be negotiated among the parties to the Pact of Paris, providing a procedure for immediate consultation, preferably through the instrumentality of the League of Nations, whenever violation of the Pact of Paris is threatened, with the object of preventing or stopping hostilities."⁶⁵ In such a system of international consultation, the contribution to the process of a peaceful political change may be considered as inherent.

Conclusions

An effective procedure for modifying obsolete treaties by the extra-legal intervention of the international community as a whole has not crystallized. President Wilson originally proposed

⁶³League of Nations, Records of the Eleventh Assembly, Minutes of the First Committee, p. 165.

⁶⁴Fenwick, "The Implication of Consultation' in the Pact of Paris," 26 A.J. (1932), p. 787; Wright, "The Meaning of the Pact of Paris," 27 A.J. (1933), p. 39; Williams, International Change and International Peace (London, 1932), pp. 54-58, 66-67.

⁶⁵"An American Foreign Policy," Public Policy Pamphlet, ed. H. D. Gideons, No. 14, p. 26.

that the principle of revision should be united with the guarantee of the status quo, thus indicating his view that the League of Nations should become a machinery for the preservation of peace and at the same time for the effectuation of peaceful political change in the general interest of the community. A separation of the two halves of the article originally proposed by Wilson as well as the weakening of that part which has now become Article 19 diminished the capacity of the League to intervene effectively in matters of political and territorial change. The practical application of Article 19 shows the impotence of the machinery. The reason that Bolivia, China, and Persia did not formally invoke this article was their doubt whether the Assembly would vote for the inapplicability of the treaties in dispute under the present procedure, and whether any such advice by the Assembly would be of real value. Unless the advice can be adopted by "qualified" unanimity and the World Court may be empowered to give legal effect to such advice by a process analogous to that of eminent domain, the possibility of application of Article 19 for treaty revision is slight. Neither the conciliatory and mediatory functions of the Council nor the implied duty of consultation under the Kellogg Pact can afford an adequate procedure for political change. All in all, the extra-legal intervention of the international community for treaty revision must be, of necessity, looked upon as supplementary and secondary to other methods of treaty change.

CHAPTER IX

CONCLUSIONS

From the foregoing study one may adduce some conclusions as to the problem of the termination and revision of obsolete treaties. One must inquire first what are the inherent difficulties in solving controversies concerning treaty change. One must then inquire what procedures are available for the solution of these controversies.

In the first place, one may admit that the problem of change is twofold: (1) the change of law and (2) the change of rights.¹ It must be recognized that international law leaves much to be desired as a formal analysis of the vast range of the needs and interests of modern states. It needs improvement in order to meet more adequately contemporary conditions.² It must also be realized that the rights acquired and transferred in the international community cannot remain permanent. They may become obsolete after vital changes of circumstances. A controversy over an obsolete treaty must either presuppose a rule of law, however imperfect, which has terminated the legal right, or a rule of equity or higher justice which permits a change of a legal right still valid in the eye of strict law. The claimant may argue that it is his right to recognize the obsolescence of a previous right as a legal consequence implicit in the facts as they now are; or instead, he may claim that he is seeking a change of right on the ground of a higher justice. Briefly stated, it is necessary to distinguish static from dynamic disputes, or, using the traditional term, legal from political disputes. It seems possible to define the static dispute as a problem of interpreting the existing law or establishing existing rights. The dynamic dispute, on the other hand, involves the problem of

¹Wright, "Article 19 of the League Covenant and the Doctrine of *Rebus sic stantibus*," in Proceedings of the American Society of International Law (1936), p. 59.

²E.g., Brierly, "The Shortcomings of International Law," 5 B.Y. (1924), pp. 4 ff.

changing the existing law of an existing right.³

The extremely categorical view which seeks to minimize the importance of particular dynamic disputes, assumes that the nature of all disputes is relative. It prophesies that political conflicts which are now recognized as beyond the pale of law may, with the progress of legal notions, the transformation of the universal juridical conscience, or the development of juridical substitutes for war, come within the legal orbit.⁴ Lauterpacht is the recent writer who has advanced most cogently the justiciability of all international disputes and the possibility of extending the basis of equitable interpretation by international tribunals as the most effective means now available for changing law as well as rights.⁵ The juridical postulate seems to overestimate the capacity of international tribunals and tends toward the creation of a legal Leviathan for the international community.⁶ One cannot be content with a court as an organ of international change. The fallacy lies in the presumption that a court is an adequate instrument for determining what the law ought to be. Judicial machinery suitable for settling purely legal claim of formal rights under the existing law is not suitable for dealing with equitable claims looking toward the change of these rights and, in effect, the change of the existing law. The latter task even in municipal law is not often performed by the courts, but by remedial legislation.⁷

The realistic view on the other hand exaggerates the

³Williams, "Justiciable and Other Disputes," 26 A.J. (1932), pp. 31-36; Chapters on Current International Law and the League of Nations, pp. 45, 50; Hostie, "Différends justiciables et non-justiciables," R.D.I., Ser. 3, XX (1928), 263-81, 568-87; Whitton and Brewer, "Problems Raised by the General Treaty of Inter-American Arbitration," 25 A.J. (1931), pp. 448-54.

⁴Institut de droit international, Annuaire, XXIX (1922), 31, 32.

⁵The Function of Law in the International Community (London, 1934), passim.

⁶Cf. the Borah resolution in the Senate of December, 1927. Cited in Shotwell, War as an Instrument of National Policy, p. 103.

⁷E.g., Williams, International Change and International Peace (London, 1932), pp. 8-10; Brierly, The Law of Nations (Oxford, 1928), p. 189.

importance of the dynamic conflicts and overemphasizes the difficulty of devising remedies in international law. The solution of such conflicts is said to rest in political action. Thus, the explanatory note concerning Article 10 of the Russian Draft of the First Hague Convention of 1899 excluded the disputes arising from "the field of political interests" from arbitration. It declared:

In fact, the mutual rights and duties of States are determined to a marked degree by the totality of what we call political treaties, which are nothing but the temporary expression of change and transitory relationship between the various national forces. The treaties restrict the freedom of action of the parties so long as the political conditions under which they are produced are unchanged. Under a change in these conditions the rights and obligations flowing from these treaties necessarily change also. As a general rule, disputes which arise in the field of political treaties in most cases concern not so much a different interpretation of this or that principle, as the changes to be made in the treaty, or the complete abrogation thereof.⁸

Reversing the optimistic advocacy of the juridical postulate, the political postulate overestimates legal anarchism in the international community and belittles the value of the change of right and of law by the process of judicial legislation.

Let us turn to an examination of the procedures by which the controversies over obsolete treaties may be solved. These procedures may be either juridical or political.

The juridical procedure for the termination and the revision of obsolete treaties is by adjudication. The capacity of the court as an organ to adapt treaties to changed conditions is necessarily limited even if the doctrine rebus sic stantibus is resurrected as an equitable principle of interpretation. While the doctrine exists in municipal law only in terms of limited cases of specific changed circumstances, it can hardly be admitted as a general principle of equitable interpretation. The lack of precision of the doctrine in international law, by the confusion and disagreement among the writers, renders its application extremely difficult. Indeed the doctrine has been formally

⁸Scott, Proceedings of the Hague Conferences, 1899, p. 809. Westlake admits the right of political action not only in cases where international law is lacking in definite rules, but in cases where "opinion is felt to be outgrowing a rule, so that a change in the law may be asserted in good conscience to be necessary, and yet, from the want of an international legislature, it is difficult to effect such change otherwise than by setting an example to it" (International Law, 2d ed., I, 30).

applied less frequently in the World Court than in many national courts. Even if the doctrine is accepted as a rule of international law, it is doubtful whether it can be of great service for adapting treaties to changed conditions within its strictly legal compass. As an equitable principle of interpretation either to give effect to the original intention of the parties or to the objective principles of law, the doctrine can be applied to certain classes of treaties under specific changes of circumstances. It is to be hoped that the World Court may apply the doctrine to treaties which create international servitudes, in case the vital change of the special geographical configuration, in view of which the servitudes were created, deprives them of their raison d'être. The doctrine may be applied with greater frequency to treaties of alliance and guarantee; treaties of extraterritorial jurisdiction, of protectorate and of sphere of influence; treaties of commerce and trading, and, by analogy, to religious concordats, when essential changes of conditions, political, economic, or religious, would frustrate the original purpose of the treaty. It is clear, however, that the doctrine cannot be applied to treaties establishing real rights as transfer of territory, or restoration of peace, nor can it be applied to treaties of law-making character, for in those cases the intention of the parties is to create a permanent state of affairs and the functions and effects of these treaties are entirely different from those of ordinary contracts. Likewise it is manifest that the application of the doctrine is inadequate to terminate treaties made under duress because if these treaties ought to be invalid in international law, they ought to be void ab initio, not only in futuro.

The political procedures for the termination and revision of obsolete treaties are normally twofold: (1) by act of the parties and (2) by the intervention of the international community as a whole. Every treaty may be terminated by act of the original parties. The ordinary rule is that of general consent of the contracting parties. This rule can be modified by the parties by inserting into treaties some provision as to their own termination. In case of treaties of a territorial nature, whether they be those transferring real rights between the parties or creating international settlements, the parties generally intend to create a permanent régime and will often find the value of these treaties

diminished if some stipulation is added as to their own termination. Thus, it has been a common practice to stipulate such clause only in the case of executory treaties, especially those of commerce and trading, and technical law-making treaties laying down rules as well as creating international organs. It is also to be noted that these treaties are usually made by an equal bargain and confer mutual benefits. Denunciation or revision clauses are scarcely ever found in coercive or unilateral treaties.

The extra-legal intervention of the international community as a whole is necessary for the rectification of the existing treaties in the general interest of the international community. The recognition by the Concert of Europe of treaty changes appears to have had an effect analogous to the power of eminent domain in public law. The recognition by the "Great Powers" however has been generally passive. It is rare that the Concert has been convened to anticipate changes and to enforce its decisions. The procedure under Article 19 has been designed as a substitute for the procedure of the European Concert. Although it is still ineffective, it may be developed. Article 19 as a useful means for treaty change would be enhanced if amendments were adopted providing: (1) that the vote under Article 19 might be taken by a qualified majority and (2) that the decision of the Assembly might be enforced, with compensation to the injured party, by the World Court in the general interest of the international community. It is also to be hoped that the conciliatory and the mediatorial functions of the Council may prove a machinery contributing to change, and that the implied consultation under the Kellogg Pact may be further strengthened so as to facilitate treaty change between the non-League members.

Treaty enforcement requires the existence of some efficacious means of pacific change. Such violent procedures of change as treaty repudiation or war can be abolished only if a channel for pacific change is left open.

